In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 22

FRED. TOYOSABURO KOREMATSU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANT.

Petition for Certiorari Filed February 8, 1944.
Certiorari Granted March 27, 1944.

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Miscellaneous Pages

Andrew W. Lind's, "The Japanese in Hawaii Under War Conditions" (1943) 9
Army Navy Journal, Navy Dept. Communiques No. 77 of May 7th and No. 88 of June 12, 1942, June 13, 1942, p. 1130 33
Army and Navy Register, "Americans of Japanese Descent", January 22, 1944, Vol. 65, No. 3346, p. 13 ..... 7n
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Encyclo. Brit., 11th Ed., Vol. 15, pp. 252-254 ..... 81n
Encyclo. Brit., 11th Ed., Vol. 15, p. 222 79
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Executive Order No. 9102 (7 F.R. 2165) 14, 23

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7 F.R. 6703	20n
Hamilton's First Plan of Government, Art. IV, Sec. 10	39
Harrop A. Freeman, "Genealogy, Evacuation, and Law", 28 Cornell Law Quarterly, p. 443 et seq	18
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H.Res. 113, pp. 11,808-11,811	85
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Public Proclamation No. 2526 (6 F.R. 6323) and No. 2527 (6 F.R. 6324)	9
Public Proclamation WD-1 (7 F.R. 6593)	24
Roberts' Report, Sen. Doc. No. 159, 77th Cong., 2nd Sess. 1942	61n
Strong, E. K., "The Second Generation Japanese Problem", pp. 6, 201	92
Strong, E. K., "The Second Generation Japanese Problem", p. 254	77n
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The Federalist, No. 74	39
U. S. Code Cong. Serv. No. 3, p. 281	42n
W.R.A. Administrative Instruction No. 22, para. 9, dated July 20, 1942	27
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BRIEF FOR APPELLANT.

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QUESTION PRESENTED.

Can a loyal American citizen be branded a criminal under the provisions of Public Law No. 503 (18 USCA, sec. 97a) for resisting military *lettres de cachet*, issued in an area free from martial rule, which commanded his seizure, removal from his home, detention in a stockade, banishment from a states-

embracing military department and final imprisonment in a concentration camp, all without trial and without an accusation of crime being brought against him?

OPINION BELOW.

The opinion of the United States Circuit of Appeals for the Ninth Circuit (R. 33-64) is reported in 140 Fed. (2d) 289.

JURISDICTION.

This Court has jurisdiction to review the judgment of the District Court below and the decision of the Circuit Court below affirming it by virtue of the provisions of Section 240(a) of the Judicial Code, as amended. (28 USCA, sec. 347a.) Appellant's petition for certiorari filed herein on February 8, 1944, was granted March 27, 1944.

STATUTE, EXECUTIVE ORDERS AND MILITARY ORDERS THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED HEREIN.

Public Law No. 503 (18 USCA, sec. 97a), Executive Order No. 9066 and Civilian Exclusion Order No. 34 are set forth in the Appendix hereto. The remaining proclamations and orders are mentioned and summarized in the context of this brief with references to the official repositories in which they are to be found.

SPECIFICATION OF ERRORS.

The appellant assigns the errors in the record and proceedings below as set forth on pages 21 to 24 of his petition for certiorari heretofore filed herein.

STATEMENT OF FACTS.

This is an appeal by Fred Toyosaburo Korematsu, a civilian and native-born American citizen, from a judgment of conviction against him in the District Court below for an alleged violation of the provisions of Public Law No. 503. (18 USCA, sec. 97a.) He was adjudged guilty and placed on probation for five years because, in the exercise of his constitutional rights of national and state citizenship, he resisted unlawful military orders issued by John L. DeWitt, a Lt. Gen., U.S.A., which were designed to banish him from his home and imprison him in a concentration camp set up for him simply because in his line of ancestry there are to be found a few persons who, either by the accident of birth or residence, may be asserted to have owed in the dim past a temporal allegiance to a long forgotten Mikado. Branded a criminal and impoverished by his own government which he ever has been ready and willing to defend with his own life he is compelled to prosecute his appeal *in forma pauperis*.

The appellant is a 25-year-old citizen of the United States and the State of California. He was born on January 30, 1919, in Alameda County, California, where he continuously resided until his arrest herein

on May 30, 1942. His parents who were born in Japan long have been residents of this country. He was educated in our public schools. He was willing to enlist in the Army but was informed by his doctors that he was unfit for service because he suffered from stomach ulcers. Because of this physical defect he was rejected by the Army when called for military duty under the Selective Training & Service Act of 1940. Disappointed at this refusal he spent his worldly savings of $150.00 to prepare himself to become a welder in order to contribute his services to our defense effort. He lost his employment after the outbreak of war because of his ancestry. (R. 24-25.)

General DeWitt's proclamation of March 27, 1942, prohibited him from leaving the limits of military area No. 1. Four weeks before he was scheduled to be confined to a stockade by order of the General he left home to earn enough money to enable him to marry the girl of his choice, a Caucasian girl of Italian extraction. He remained in Alameda County, however. He didn't wish to be ousted from his home or to leave his girl and friends. Nobody would. He decided to evade evacuation by migrating to the Middle West. To prevent social ostracism upon settling there he underwent a plastic operation to alter his features in the hope of passing for a Caucasian and assumed the name of Clyde Sarah. The operation was unsuccessful. (R. 20.)

On May 3, 1942, he was ordered to report on May 9, 1942, for imprisonment in the Tanforan Assembly Center by the General's civilian exclusion order No.

34. He was never given a chance to migrate voluntarily. He was denied this right by the aforesaid orders. He failed to report for evacuation. He was apprehended in San Leandro, Alameda County, California, on May 30, 1942. He was indicted on June 12, 1942, and on September 8, 1942, was tried and convicted for a violation of Public Law No. 503, and placed on probation.[1] General DeWitt neither considered, appreciated nor respected Korematsu's wishes and rights in the matter. He had the appellant taken from the courtroom and incarcerated in the Tanforan Assembly Center and thereafter ordered him deported and imprisoned in the Central Utah War Relocation Center situated at Topaz, Utah.

The appellant has a slight knowledge of the Japanese language. He has never attended a Japanese language school. He has no police record. He has no dual citizenship. He is a loyal citizen who has exer-

[1]The statute was never anything but a lash by which compliance with military orders was obtained and innocent citizens subjugated to the caprice of a military commander. When released on bail pending trial the appellant was seized and cast into the Tanforan Assembly Center, a stockade, upon instructions of General DeWitt. The General thereby demonstrated his contempt for the Courts. The appellant was produced for trial in the custody of armed military police. The appellant's loyalty to this nation was proved at the trial. Nevertheless, when judgment was pronounced and the appellant placed on five years' probation the military police, acting upon the General's orders, escorted him directly from the courtroom to confinement in the stockade. Evidently the General expected the Court to act as a ratifier and not as a rectifier of wrong. Apparently he feared injustice might be treated of its victim. He was not concerned that Korematsu's loyalty had been proved. His anxiety to imprison and deport a loyal citizen demonstrates the motive that prompted his evacuation program was not born of his concern for national security but of prejudice against Americans of Japanese lineage.

cised the rights and performed the duties of citizenship. He has never been outside the continental limits of the United States. He is and steadily has been ready and willing to render whatever services he may to this nation in our war against the Axis powers. (R. 24.) More could not be asked or expected of any citizen.

Korematsu had the good fortune, so we have been taught, to be born an American national who, upon attaining his majority automatically succeeded to the right to exercise all the privileges of citizenship. He had, however, the misfortune, so we have learned, to have been deemed by General DeWitt, by a queer quirk of logic, to have selected a few ancestors over whom a deceased ruler in old Japan may have claimed suzerainty. His crime, under Public Law No. 503, was that he resisted his scheduled "evacuation" and "relocation," deceitful words by which the General would entice us into the belief these were genuine security measures designed to protect the public from him and him from the public. By evacuation the General meant *banishment* and by relocation he meant *detention* so that the whole outrageous program or pogrom, as you will, as planned and carried into execution, was *imprisonment* without cause, without justification and without trial in defiance of the very letter and spirit of the Constitution which, by solemn oath, he was bound to defend and preserve. It makes little difference whether this was the exact schedule as originally planned or as subsequently developed by progressive stages. The primary objective was banish-

ment and, as the program unfolded, final imprisonment loomed in the offing. The Courts below have sustained the General's nation-shaking plan and constitution-destroying orders. This appeal is prosecuted that there shall be a final determination of the rights of a citizen in wartime in an area free from martial rule.

Significant facts.

It is highly relevant to the issues herein that on the eventful December 7, 1941, there were thousands of American citizens of Japanese lineage serving in our armed forces. In addition to those serving in the National Guard in Hawaii many were serving in the Territorial Guard of Hawaii.[2] Thousands on the mainland long prior thereto had registered under the Selective Training and Service Act of 1940. In excess of 5000 had been called to the colors and were serving with honor, credit and distinction. (See letter of the President to the Secretary of War dated February

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[2] Disappointed when inactivated in March, 1942, by General Delos C. Emmons, Commander of the Hawaiian Department, a group of these from the University of Hawaii organized themselves into the Varsity Victory Volunteers, tendered their services to General Emmons, were accepted and detailed to the 34th Combat Engineers. This group was inactivated after 11 months of service to enlist in the Army. Excluded from the draft, 10,000 volunteered to form the 442nd Combat Team which made history in Sicily and on the bloodstained beaches at Salerno. See article in Army and Navy Register, "Americans of Japanese Descent", January 22, 1944, Vol. 65, No. 3346, p. 13, and article entitled "Hawaii—Fortress of the Pacific", by Lt. Gen. Robert C. Richardson, Jr., in Dec. 7, 1943 issue of Army Navy Journal, p. 48. The remarkable record of the 100th Infantry Battalion formerly a unit of the National Guard of Hawaii, is also well known to the nation

1, 1942, and H.R. 2124, p. 143.)[2a] Attention is to be drawn to the fact that at the time many were serving in the Military Intelligence Service and that today there are not fewer than 600 of these youths performing excellently in G-2 in the Central, the South and the Western Pacific Areas where they are considered indispensable by our military commanders in those theaters of operation. It is reasonable to conclude that each family of Japanese stock within our jurisdiction had its representative in our armed forces at the outbreak of war and several representatives since. These facts are not publicized by the War Department because of the chagrin it must feel when reflecting upon the wrongs inflicted upon these people. Apparently General DeWitt alone of our departmental military commanders failed to repose confidence in these servicemen and their families. It is extraordinary that while our commanders in the battle areas considered and knew them to be reliable defenders of our security General DeWitt, in the comparative safety of our Western states, would convince us they were a potential menace to our national security. He excluded American soldiers of Japanese pedigree and their families from the forbidden military areas he established. He excluded those among them who were veterans of the first World War.

[2a] References herein to House Reports Nos. 1911 and 2124 and House Resolution No. 113, abbreviated to H.R. 1911, H.R. 2124 and H.Res. 113, relate to published Hearings before the Select Committee Investigating National Defense Migration, 77th Cong. 2nd Sess. 1942, commonly called the Tolan Committee reports. General DeWitt's "Final Report: Japanese Evacuation From the West Coast" which was publicly released on January 19, 1944 is referred to herein as "Final Report."

Facts underlying banishment and the technique of oppression.

Immediately following the air attack upon Pearl Harbor on December 7, 1941, the President enjoined Japanese nationals within our jurisdiction to preserve the peace and prohibited them from possessing firearms, ammunition, signal devices, cameras, short wave radios and other articles of a contraband nature. (Public Proclamation No. 2525, 6 F.R. 6321.) On December 8, 1941, he placed similar injunctions upon German and Italian nationals within our jurisdiction. (Public Proclamations No. 2526, 6 F.R. 6323, and No. 2527, 6 F.R. 6324.) His proclamations were issued under authority of the Alien Enemy Act, 50 USCA 21, and authorized the Attorney General to enforce the provisions thereof on the mainland and the Secretary of War on our outlying possessions. (See also, H.R. 2124, pp. 294-300.) On December 8th Congress declared war on Japan. On December 11th Germany and Italy declared war on us and Congress retaliated by declaring war on them.

On the 7th Japanese nationals in Hawaii and American nationals of Japanese ancestry went through the first baptism of fire in this war. Many of them were slain and many wounded by the bombing by our Japanese enemies. They suffered more civilian casualties than all of the other ethnic groups combined. See Andrew W. Lind's, "*The Japanese in Hawaii Under War Conditions*" (1943), American Council Institute of Pacific Relations. The bombing demonstrated that our enemies bore no love for the Japanese long residents in Hawaii and their American children.

The Department of Justice lost no time in apprehending alien enemies deemed to be dangerous to our security. The F.B.I. promptly arrested and interned 5000 Axis nationals. (Annual Report, F.B.I., 1941.) By June 30, 1942, it had taken 9405 into custody. (Annual Report, F.B.I., 1942.) A total of 12,071 Axis nationals taken into custody under authority of the Alien Enemy Act upon being interned in special internment camps in North Dakota and elsewhere in the Middle West were given individual administrative hearings by the Department of Justice. Of the Japanese all except 1974 were released after examination. (See report of Attorney General covering survey of the activities of his office released during the week of December 1, 1942.) This figure probably has been reduced since the survey was published.

By the end of January, 1942, a press demand for the evacuation of alien enemies arose. (H.R. 1911; p. 2.) There was little, if any, separate agitation against Japanese aliens and their native-born offspring resident on the Pacific Coast until the latter part of February, 1942, when it was rumored that General DeWitt might desire an evacuation of "all Japanese" from the region. Thereafter an artificial clamor of a sporadic nature was instituted against them by cunning persons long known to be hostile to Orientals. A few persons of diseased minds endeavored to inflame public opinion against them through the medium of absurd petitions, press diatribes and

jingoist radio broadcasts.[2] A few cowardly public officials with an eye to personal publicity declaimed against them. A few ignorant town councils in backward rural areas passed illegal restrictive measures against them, with a view, of course, to ousting them from farming areas so that their properties might be acquired at a trifle of their values. Behind the mask of artificially created war-hysteria anti-Oriental pressure groups carried on their machinations designed to result in the deportation of these people. Masquerading in the customary garb of patriots these opportunists were willing to create misery and suffering upon the part of a helpless minority unmindful of the fact that thousands of Americans of Japanese parentage then were serving in our armed forces to defend the security of this nation. They sought to invoke the craven spirit of vigilantism in order that they might derive either political preferment or private profit for themselves. They deliberately labelled these innocents disloyal and sought to have the public confuse them with our hostile alien enemies. Puffed up with their own importance, while resting in the sheltered comfort and security of civilian life, they unsuccess-

[2] Whether or not General DeWitt was influenced by this flood of propaganda is a matter of conjecture. If he was, his subsequent action taken against them was not founded upon fact but upon fiction, from which it would follow that he became a mere tool in the hands of the sponsors who set the machinery of oppression in motion. If not, his action was purely the result of personal prejudice.

fully spurred the public on to acts of lawlessness.[4] These quiet citizens, thousands of whose sons were in uniform, suffered the agonies of war and, along with their families, these insults and humiliations and, finally, the embarassment of banishment and imprisonment, all because of the color of their skin, the slant of their eyes, the religions they professed and the old nationality of a few of their forebears. The public, being neither ignorant, prejudiced nor of a lawless breed, was not misled by the rising tide of propaganda but greeted it with the silence it merited and exhibited not the slightest inclination to molest these people. A genuine public demand for the evacuation of these citizens never arose.

On January 14, 1942, the President, by Public Proclamation No. 2537, required all alien enemies to acquire ideintification certificates. Between January 29, 1942, and February 7, 1942, the Attorney General, under authority delegated to him by the President, set up zones upon the West Coast and restricted the activities of all alien enemies therein.[5] (H.R. 2124,

[4]The old discarded cry of the "yellow peril" was fished up from the gutter of the past and resuscitated by them oblivious to the fact that in so doing they exhibited the yellow streaks that ran up their own backs. Many of those who would terrorize these citizens are those hyphenated-Americans whose spiritual home is in Europe and who ought, in good conscience, take up residence there. For a history of this agitation see H.R. 2124 pp. 149, 150, 156.

[5]The restrictive measures taken by the President and by the Attorney General were imposed and enforced under the Alien Enemy Act and affected only those alien enemies of the "age of 14 years and upward" under the Act. This zoning and restricting action of the Attorney General later was duplicated and then expanded by General DeWitt, not pursuant to the Act, but under an empty claim that it was authorized by Executive Order No.

pp. 302-314.) The restrictive areas encompassed national defense material, premises and utilities defined in 50 USCA, Sections 101, 102, a statute entitled, "Willful Destruction of War or National Defense Material," a violation of which is punishable by 30 years' imprisonment and $10,000 fine under Section 102 or a like sum and 10 years under Section 105. The declared purpose of setting up these prohibited zones was to prevent acts of espionage and sabotage to such material, premises and utilities. These proclamations had a reasonable relation to national security and properly were invoked under the Alien Enemy Act. On February 4, 1942, the Attorney General announced that an area extending from 30 to 150 miles inland from the Pacific Coast had been declared a "restrictive area" and on the same day he established curfew regulations and placed travel restrictions upon all alien enemies residing therein. (H.R. 2124, p. 310.) Approximately 10,000 German, Italian and Japanese nationals departed from the forbidden areas and settled in outside areas. These alien enemies were not confined to concentration camps. (H.R. 1911, p. 2.)

A general's inhumanity to citizens.

On March 2, 1942, General DeWitt set up Military Areas Nos. 1 and 2 and required alien enemies and

9966. The General, however, applied his orders to Japanese aliens and citizens of Japanese ancestry but not to German and Italian nationals. It does not appear that the General consulted the Attorney General on the matter but the fact that he invaded the domain of the Attorney General is clear. The Attorney General didn't call upon General DeWitt to take over his duties. By training, inclination and perspective the Attorney General's office was better fitted to handle civil affairs than the General.

citizens of Japanese ancestry in Military Area No. 1 to give notice of change of residence.* (Public Proclamation No. 1, 7 F.R. 2320.) Thereafter, on March 16, 1942, he set up four additional military areas, viz., Military areas Nos. 3, 4, 5 and 6 and required of like residents therein a similar giving of notice of change of residence. (Public Proclamation No. 2, 7 F.R. 2405.) The military department of General DeWitt's command so set up embraces eight Western States and comprises in excess of one-fourth of the total geographical area of the continental United States. (His jurisdiction also included Alaska.) In this department the General would play and has played the part of an arbitrary and merciless ruler over citizens of Japanese lineage. National defense material, premises, and utilities are situated in certain localities within his Military Department but they do not by any means occupy the whole extensive prohibited areas he set up.

On March 18, 1942, the President issued Executive Order No. 9102 (7 F.R. 2165) establishing the War Relocation Authority, an executive office, to formulate and effectuate a program for the removal from military areas designated by military commanders of persons or classes of persons designated but not evacuated therefrom under Executive Order No. 9066.

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*Military Area No. 1 embraces the westerly halves of Washington, Oregon and California and the southern half of Arizona, while Military Area No. 2 embraces the remaining halves of said states. Military Areas 3 to 6 inclusive took in the whole of the following states, viz., Idaho, Montana, Nevada and Utah.

On March 21, 1942, Public Law No. 503 (18 USCA 97a) became effective. It makes it a misdemeanor for anyone to enter or leave military areas contrary to a military commander's unknown orders to be prescribed *in futuro* without, however, prescribing any standard, rule or policy to guide the military commander in prescribing areas and without setting limits to his authority to control the activities of civilians therein.

On February 13, 1942, a delegation of West Coast congressmen, without hearing any witnesses but probably influenced by the propaganda that had been directed against alien enemies generally, sent a letter to the President suggesting that it might be desirable for the Army or the Department of Justice to remove from "all strategic areas" all persons "whom they may select" whose presence was inimical to national defense. (H.R. 1911, p. 3.) Its recommendation was not directed to an indiscriminate mass removal of persons or to a segment of our people on the basis of ancestry but to the removal of certain individuals from limited areas containing military resources.

In early February, 1942, the Tolan Committee, the House of Representatives Select Committee Investigating National Defense Migration, was authorized to

Responses by various state governors to this committee's telegrams inquiring if the states would accept prospective evacuees from the West Coast, with few exceptions, show these officials to be opposed to dumping "alien enemies" in their respective states. Very few of them raised any objection to citizens of Japanese ancestry. See replies, H.R. 1911, pp. 27-31. The objection to such dumping arose from economic and political but not from racial reasons.

open public hearings touching upon the question of evacuating persons and made arrangements to open its hearings in San Francisco and Los Angeles on February 21, 1942.

Thereafter, on February 19, 1942, the President signed Executive Order No. 9066 (7 F.R. 1407) authorizing military commanders to prescribe military areas from which any and all persons might be excluded. It had been prepared by the War Department and presented to him. (*Final Report*, p. 25.) It also provided that federal agencies might be utilized to provide for the transportation, food, shelter and other accomodation of persons who might be prohibited from leaving or entering military areas so prescribed. It ratified the restrictive action that had been taken against alien enemies by the Attorney General. Its purpose was declared to be the taking of every possible protection against espionage and sabotage to national defense material, premises and utilities defined in 50 USCA, Sections 101 and 104. It contains no language authorizing a discriminatory evacuation of persons based upon an ancestral origin or without affording the affected residents a hearing on the question of a necessity for their removal. It is from this order, however, that the proclamations and exclusion orders hereinafter mentioned assert they derive their questionable validity.

On February 19, 1942, a bill, S. 2293, providing for the detention of any or all Japanese was introduced in the Senate but it failed to pass. (See 88 Cong. Rec. Feb. 19, 1942. Tolan Com. Rep., S. Rep. No. 1496,

Calendar No. 1541 (1942).) The Attorney General rendered an opinion that American citizens of Japanese ancestry were not removable under presidential orders. The General, however, acted like Ajax when the counsel of Ulysses was given. He disregarded the opinion of the Attorney General and removed them. On March 23 and 24, 1942, Edward J. Ennis, Director of the Alien Enemy Control Unit, testified before the Tolan Committee that the transfer of control over citizens in the excluded areas from the Attorney General to military commanders was designed for acceptance by the public as "an exercise of the war power." (H.R. 2124, p. 166.) The Attorney General's office is an executive one and could exercise delegated war powers as well as the military commander; consequently, it would seem that the evacuation was not made any more acceptable to the victims and to the public by urging that an arbitrary discrimination becomes lawful merely by labelling it "an exercise of the war power."

Thereafter, on March 24, 1942, he commenced his pernicious campaign against citizens of Japanese ancestry. By Public Proclamation No. 3 (7 F.R. 2453) he subjected the appellant, all alien enemies and persons of Japanese ancestry within Military Area No. 1 and zones in Military Areas Nos. 2 to 6 inclusive to curfew regulations and travel restrictions. Therein he threatened the citizens affected thereby

In *Hirabayashi v. U. S.*, 320 U. S. 81, the curfew regulation imposed by this proclamation was held justifiable for a limited period of time as an emergency war measure under the circum-

with criminal prosecution under Public Law No. 503 for a violation of its provisions and alien enemies affected thereby with internment for a violation thereof. (Citizens who violated the orders, however, have been jailed first and thereafter interned.) It also prohibited the affected citizens and aliens from possessing designated articles of personalty of a contraband nature and compelled the confiscation thereof without making any provision for compensation. Evidently he did not comprehend the provisions of the 5th Amendment which forbids the confiscation of private property under an asserted claim that the taking is for public use unless the taking is accompanied or followed by just compensation. Neither expressly nor impliedly has Congress authorized the General to declare the private property of citizens to be contraband and subject to confiscation. This was a direct deprivation by General DeWitt without prior or subsequent authorization.

On March 24, 1942, he also issued Civilian Exclusion Order No. 4 (7 F.R. 2581) excluding all Japanese descended persons from Bainbridge Island, Washington, allowing those who received permission to leave to depart by March 29, 1942, for destinations outside the boundaries of Military Area No. 1 and enjoining those remaining there on March 30, 1942, to report to a Civil Control Station, for evacuation and involuntary exile."

"The "voluntary" exile of those who were permitted to depart was of short duration for as the evacuation program expanded those who had taken up temporary residence in Military Area No. 2 in California were picked up and imprisoned in concentra-

On March 27, 1942, he promulgated Public Proclamation No. 4 (7 F.R. 2601), a freezing order, which prohibited the citizen appellant and all persons of like lineage from leaving the limits of Military Area No. 1 where they resided. The hypocrisy of this order becomes apparent when it is discovered that it was asserted to be necessary to insure an orderly evacuation and resettlement of Japanese "voluntarily" migrating from Military Area No. 1. He would lead us to believe the bayonets that backed his commands were pointless. (See also Pub. Proc. No. 6, 7 F.R. 4436, which froze them in Military Area No. 2.)[10] It threatened citizens with criminal prosecution under Public Law No. 503 and Japanese nationals with internment for a violation of its provisions. On March 30, 1942, he issued Public Proclamation No. 5 (7 F.R. 3725) permitting certain German and Italian nationals exemption from exclusion from military areas. Like exemptions were not allowed alien Japanese and citizens although many of these citizens were American

tion camps. This indicates the original plan of the commander was more concerned with imprisonment than with mere evacuation and indicates the program was not designed as a security measure but was the offspring of his prejudice against Americans of Japanese descent.

[10] His excuse for freezing residents in Military Area No. 2 including the emigrees from No. 1 therein is now asserted to have been to prohibit "further migration out of or into that area in preparation for controlled evacuation". (Final Report, p. 105.) Apparently he was not aware that freedom of movement is a privilege of national citizenship. Had he ceased interfering with citizens' rights at a "voluntary" departure stage it might have been argued he was sincerely concerned about national security. No voluntary migration period was offered the great majority of these people, however. When he issued these freezing orders he demonstrated his action was inspired by nothing but prejudice and that his objective was their deportation and detention.

soldiers of Japanese ancestry who desired to visit members of their families in the forbidden areas. Did the undiscerning General consider German and Italian alien enemies to be defenders and these citizens, friendly aliens and American soldiers a menace to our security?

On March 30, 1942, he announced, for the first time that an evacuation "*was in prospect for practically all Japanese*". See H.R. 2124, p. 165; and Press release, Wartime Civil Control Administration, March 30, 1942. This being the first indication that he intended this discriminating action against Americans of Japanese descent proves that neither Congress nor the President were aware of his real intentions on February 19, 1942, when Executive Order No. 9066 was signed and on March 21, 1942, when Public Law No. 503 was passed by Congress and approved by the President.

The civilian exclusion orders.

Thereafter he issued a series of civilian exclusion orders[1] which resulted in the roundup and forcible

[1] A total of 108 civilian exclusion orders was issued by the General, No. 1 having issued on March 24, 1942 (7 F.R. 2581) and the last, No. 108, having issued on August 18, 1942 (7 F.R. 6703). Each of these is published in Vol. 7 of the Federal Register. Although the battle of Midway had been won on June 6, 1942, by our forces and our island outposts thereby were rendered secure from danger of invasion the General continued on until the latter part of August, 1942, issuing exclusion orders and until October 30, 1942, in removing these people to relocation centers. This suggests that he entertained no fear of espionage or sabotage on the part of any of these people but that he was bent on their exile from the Pacific Coast because of his prejudice against them. His insistence upon having numbers of them

seizure of some 73,000 citizens of Japanese lineage and 43,000 Japanese aliens, few of whom were of military age. (H.R. 1911, p. 12; H.R. 2124, p. 91 et seq.) His armed troops escorted them to stockades adroitly misnamed "Assembly Centers" and "Reception Centers". The prisoners were deposited in fifteen of these temporary prisons which were surrounded by barbed wire and patrolled by military police. Twelve of these were situated in California and one in each of the following states, namely, Washington, Oregon and Arizona. (*Final Report*, map and legend, p. 158.) The first deportees to occupy any of these arrived on March 27, 1942, and the last on May 10, 1942. The first stockade to be vacated was closed out on June 2, 1942, and the last on October 27, 1942. (Ib., p. 158.) If he really believed these people to be spies and saboteurs or to be harboring spies and saboteurs in their midst why did he delay from December 7, 1941, to March 30, 1942, before removing the first contingent into assembly centers? If he suspected them of criminal tendencies why did he delay thereafter until May 10, 1942, before removing all of them into assembly centers? The days before the battle of the Coral Sea (May, 1942) and the battle of Midway (June 2-6, 1942) which stemmed the tide of Japanese aggression in the South and Central Pacific were critical ones.[12] Had he suspected them of such acts

imprisoned in the four camps outside his military department is more suggestive of an ingrained prejudice against these people than of any fear of danger to national security from them.

[12] The appellant was apprehended on May 30, 1942, and convicted on September 8, 1942. On both dates Hawaii was safe from invasion and from air attack although it was not then certain that an air attack could not be made. The mainland was not threatened.

or proclivities he would not have taken so long to incarcerate them. He would not have incarcerated them in compounds on the Pacific littoral in the very military area from which he would lead us to believe the greatest danger from them existed. This would seem to corroborate the evidence that his banishment program was prompted less by suspicion of them than by his personal prejudice against them.

From these temporary prisons the prisoners were removed by the General to final imprisonment in concentration camps set up especially for them and euphemistically misnamed "War Relocation Centers". These camps are ten in number, two being situated in each of the following states, namely, California, Arizona and Arkansas, and one in each of the following states, namely, Utah, Colorado, Wyoming and Idaho. (Ib., pp. 249-264.) Six of these are within the Western Defense Command, the military department of General DeWitt, and four *outside* his department. Each of these prisons is surrounded by barbed wire and patrolled by armed guards. The transfers from assembly to relocation centers started on May 26, 1942, and were completed on October 27, 1942. (Ib., pp. 282-284.) In establishing the Tule Lake and Manzanar Relocation Centers on the Pacific Coast the General certainly indicated he entertained no fear of espionage or sabotage on their part. The recent conversion of the camp at Tule Lake into a segregation center for those denied leave clearance suggests that those responsible for its conversion do not anticipate much trouble from the internees. If there existed any

reliable evidence of a predisposition on the part of any of them to commit overt hostile acts or if the authorities in charge feared any such acts the internees would have been confined to prisons far inland.

Under this series of civilian exclusion orders which the General issued under the pretext of color of authority of Executive Order No. 9066 the banishment and imprisonment program of these people was accomplished in method as follows: They were excluded systematically from the whole of California (Public Proclamations Nos. 4 and 11; 7 F.R. 2601 and 6703) and from Military Area No. 1 in Washington, Oregon and Arizona unless they were within the bounds of Assembly Centers which were under the control of the "Wartime Civil Control Administration", a military agency set up by General DeWitt. (See also, Pub. Proc. No. 7; 7 F.R. 4498.) Under the prodding of military escorts these orders drove them into the fifteen assembly centers.[18] From these centers they later were conveyed, under the goads of military guards, to relocation centers which were managed by the War Relocation Authority, the executive agency created under Executive Order No. 9102. On May 19, 1942, he issued Civilian Restrictive Order No. 1 (8 F.R. 982) prohibiting these people from leaving these

[18] The Japanese aliens and Americans of Japanese descent in the "B" zones of Military Area No. 2, except in California, and Military Areas Nos. 3 to 6 inclusive have not been placed in concentration camps but they are forbidden to leave the small restrictive zones and, consequently, are imprisoned therein. All of those who resided in California are imprisoned in concentration camps.

assembly and relocation centers without authority.[1] On June 27, 1942, he promulgated Public Proclamation No. 8, (7 F.R. 8346), a general detention order, which designated existing and future relocation centers within his military department as "War Relocation Projects". It required the inmates to remain within the bounds thereof and visitors to obtain written permission from his headquarters to visit them. The confinement was not designed to be temporary but indefinite in nature.

By letter dated August 11, 1942, the General delegated authority to the W.R.A. to issue permits for "conditional leave" from these prisons to persons who could qualify therefor. On August 13, 1942, approximately nine months after the outbreak of war, the Secretary of War issued Public Proclamation WD-4 (7 F.R. 6593) under which the relocation centers outside General DeWitt's military department were designated military areas and the departure of persons of Japanese stock there confined was forbidden without permission of the Secretary of War or the Director of the W.R.A. The War Department, consequently, must share the blame with the General for the harm done to these people. If it was not a principal in the matter it was, nevertheless, an aider or abettor.

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[1] There seems to have been little necessity for the issuance of this order for the prisoners were confined to compounds bounded by barbed wire and were kept under surveillance of armed troops who patrolled outside with instructions to shoot any who attempted to make a break for freedom. The order was a mockery.

Citizens of Japanese lineage and Japanese nationals residing on the Atlantic seaboard and in other states outside General DeWitt's department were and are allowed freedom of movement without interference. Had these people been suspected of a predisposition to espionage and sabotage by the military commanders in whose departments they reside and where national defense material, premises and utilities abound, they, too, would have been taken into custody. Evidently our departmental military commanders do not share General DeWitt's prejudices and suspicions.

Jurisdiction and practice of the W.R.A.

Under the provisions of Executive Order No. 9102 the Director of the W.R.A. was vested with the ostensible authority to provide for the relocation, maintenance and *supervision* of all persons deported from the military areas. He was also authorized by its terms to establish the W.R.A. Work Corps, to prescribe the work to be performed by the evacuees in the corps and the compensation to be paid. Although internees recruited to perform seasonal work outside these camps are paid the low wages their labor may fetch in the labor market those employed in the camps are eligible to receive either $12, $16 or $19 per month and no more although they labor eight hours per day. (*W.R.A. Manual*, Chap. 50.5 par. 6-A et seq.) Labor unions and the government appear quite indifferent about these peon wages and the provisions of the 13th Amendment insofar as these citizens are concerned. Under this presidential order the W.R.A. has estab-

lished a procedure whereby internees who are found to be loyal may obtain a release from the immediate confines of the concentration camps and step out into the freedom of a larger prison.

The mechanics of this freedom are as follows: An internee may apply for a "leave clearance", a permit reminding us of the barbarous permit systems of totalitarian states. The grant of this clearance depends entirely upon the whim and caprice of the Director. No hearing is granted to the applicant. The Director considers secret reports of the F.B.I. and other data contained in a *dossier* which he maintains on the applicant. The confined citizen is offered no opportunity to learn the nature of any charge against him, to examine any statements or to contest matters in the *dossier* adverse to his interest. He is tried in the style first instituted by General DeWitt, that is, *in camera*, in the recesses of the Director's mind. It is neither a judicial nor an administrative hearing but it is an expression of usurped legislative and judicial power. The citizen is neither charged with disloyalty nor offered an opportunity to demonstrate his loyalty. A grant of leave clearance is a finding that the applicant is loyal. If the application is granted the applicant thereafter is allowed to apply for a type of conditional leave. The types are designated, *short term leave*, *seasonal work leave* and *indefinite leave*. Each type, however, is subject to restrictions and to revocation. See Part 5, Chap. 1, Title 32, *Code of Federal Regulations*, as amended January 1, 1944.

(9 F.R. 154.). Also see, *W.R.A. Manual*, Chaps. 60 and 110.

The most favorable form of leave to an applicant is indefinite leave which is made dependent upon whether the applicant is capable of self-support and whether the community in which he intends to reside will accept him. These conditions are determined arbitrarily by the Director without any hearing being granted the applicant. It is to be noted that indefinite leave is just as vague and indefinite as its name. It does not entitle the recipient to return to his home situated within the states embracing military department of General DeWitt's Western Defense Command, an automatic exclusion from one-fourth of the geographical area of the United States. (General DeWitt would not recognize the finding of loyalty. His exclusion rules are still enforced.) Before such a leave will be granted the applicant must consent to make reports to the Director of any change of residence or employment. Wherever the applicant might be allowed to go on this leave he remains not only in the custody of the W.R.A. but also in the "*constructive custody of the military commander*" in whose jurisdiction the relocation center lies where the leave permit is issued. See *W.R.A. Administrative Instruction No. 22*, paragraph 9, dated July 20, 1942. This instruction was superseded in July, 1943, but the military jurisdiction still obtains. He is not allowed to return to his home and former employment. The exclusion orders have not been revoked but are still in

force. In whatever light this leave is viewed it will be seen that it amounts to nothing more than increasing the size of the applicant's prison. This is a strange freedom to allow an American citizen when the grant of leave itself is a finding by the Director that the applicant is loyal to this country. Wherever, therefore, you meet any of these ex-inhabitants of the Pacific states, reflect for a moment. They are on leave —of course, only to perform menial tasks wherever the W.R.A. and the military authorities will permit them to go and remain by sufferance. You may not see the invisible ropes tied to them and leading back to the W.R.A. and General DeWitt that compels them to respond like puppets to governmental caprice but they are very real ropes nevertheless.

Civilian Exclusion Order No. 34 destined the appellant to banishment and imprisonment.

Civilian Exclusion Order No. 34 dated May 3, 1942, excluded the appellant from the south section of Alameda County, California. This area is conspicuously notable for the absence of national defense material, premises and utilities.[1] The order required him to

[1] The region is a rural one largely devoted to truck farming and cattle grazing. If the General was so intent upon removing these people from areas where acts of espionage and sabotage might be committed and he really suspected them of being bent upon such crimes why did he transport them from a farming area into the midst of military and defense installations where such acts easily could have been committed by internees so inclined? This move suggests that the confinement was not designed to prevent such acts at all but that it was inspired by prejudice and was but one step in a plot to banish these people from the Pacific Coast, an objective long sought by rabid baiters of Orientals.

report to a Civil Control Station situated in Hayward to receive instructions preparatory to being driven, under duress, into an assembly center situated at Tanforan, San Mateo County, California, which was situated west of his home and some 15 miles closer to the Pacific shoreline. This center was situated in the very midst of military premises and installations and in the vicinity of coastal fortifications. It adjoined military, naval and civilian air fields and was adjacent to defense plants. A violation of this order was declared therein to render him liable to criminal prosecution under Public Law No. 503. The statute, by this means, was used as an instrument to drive the appellant and similar Japanese descended citizens into the stockade which was designated an assembly center. It was for an alleged violation of this order that the appellant, after apprehension, was indicted, tried, convicted and placed on probation by the District Court below, from which judgment this appeal was initiated. The order was issued under a claim it was authorized by Public Proclamations Nos. 1 and 2 which were asserted to derive their validity from Executive Order No. 9066. When ordered on probation the appellant was reseized by military police, under the General's instructions, and was taken from the courtroom to the Tanforan Assembly Center where he was again imprisoned. From this temporary prison he was ordered transported to the Central Utah War Relocation Center and was taken there sometime during October, 1942. His imprisonment was precisely that originally scheduled by General DeWitt's punitive evacuation

program. The order was but a unit step in the program that destined him to banishment from the Pacific states and final imprisonment.

Thus for the first time in the history of this Republic a veritable reign of terror was established over a segment of our citizenry which found a portion of our populace apathetic to this terrible precedent and a few ignorant officials, state and federal, viewing with approval or disinterest a situation they had sought to create. Thus were these citizens deprived of their liberties and properties, reduced to misery and suffering and treated with less consideration than we give hostile alien enemies. We would not mistreat prisoners of war because of the political repercussion that would follow in its wake and because of the probability of reprisals on our citizens in the hands of our enemies. No nation, however, will protest our mistreatment of our own citizens. Civilians, men, women and children, have been uprooted, driven from their homes like cattle and imprisoned behind barbed wire and are herded by armed guards. It is contended by the appellee that this barbarianism is due process of law because we are engaged in a war. It is for this Court to determine whether the due process clause of the 5th Amendment, which was designed to expand our rights and liberties, is to be used as a knife to whittle away the Constitution itself.

The whole imprisonment program is reviewable.

The original exclusion of the appellant and other citizens of Japanese ancestry from their homes, their

temporary confinement to stockades, their transfer to concentration camps, the permission granted those found to be loyal to increase the size of their jails but not to return to their former homes and employments are not separate and distinct injuries. They are parts of one single program, the aim, purpose and result of which was their permanent banishment from the Pacific Coast. Public Law No. 503 was nothing but one of the instruments by which this was accomplished. Citizens were exiled whether or not they violated the provisions of this statute. The appellant was scheduled for banishment and destined for imprisonment in a concentration camp by General DeWitt despite the fact that as to citizens the only punishment provided for a violation of military orders, if lawful, was that provided by the statute. He was not banished and imprisoned for violating the statute but for disobeying the General's Constitution-destroying military orders which were nothing if not penal *lettres de cachet* issued and enforced in an area not under martial rule. Consequently, the questions to be determined by this Court are not only whether the General had a right, as distinct from the power, to do these things, but whether the Courts can brand the appellant a criminal for resisting these right-destroying orders instead of preserving his constitutional rights by removing the brand of criminal from him regardless of what the military commander has done to him. There can be no doubt that insofar as the appellant's rights are concerned herein that the entire imprisoning program called an "evacuation"

is reviewable by this Court. *Hirabayashi v. United States*, 320 U. S. 81; *Lovell v. Griffin*, 303 U. S. 444.

The appellant was scheduled for banishment and imprisonment by General DeWitt and has escaped neither. It is to be presumed that the General was aware that Japanese, German and Italian nationals suspected of being dangerous to our security were promptly arrested by agents of the F.B.I. upon the outbreak of war. It must be assumed he knew that these aliens were given prompt individual hearings by the Department of Justice at which they were offered ample opportunity to demonstrate their lack of hostility to this nation and that the great majority of them were found to be friendly to us and released. Like hearings were never given to the deported citizens by General DeWitt or the W.R.A. The elements of due process of law were observed in the administrative hearings given to the alien suspects by the Department of Justice. No hearings whatever, judicial or administrative, were given or provided to be given to the evacuated citizens either before or since their evacuation. No hearings were contemplated, scheduled or given to them by the W.R.A. These citizens were kidnapped and are held in duress. Why is it that the General, and the W.R.A., executive agents, arbitrarily can dispense with or exercise judicial power in a manner denied to our Courts? White alien enemies have been better treated than these citizens and have been accorded the due process of law denied them.

There was no immediate threat of espionage or sabotage to our military resources from these people during the period from December 7, 1941, to the time of their evacuation. It was during this critical period that Japan was on a groping offensive in the Central, Southern and Western Pacific areas. The utter absence of such acts during this period proves the want of danger from these people. Nevertheless the General started on his program by issuing exclusion orders. Japan's advance eastward toward Hawaii was stopped in the Battle of the Coral Sea, May 4-8, 1942. (See Navy Dept. Communiques Nos. 77 of May 7th and No. 88 of June 12, 1942, Army Navy Journal, June 13, 1942, p. 1130.) Nevertheless the General kept on issuing his exclusion orders. Japan's naval might was crushed in the Battle of Midway on June 2-6, 1942. This overwhelming victory prevented any further advance by Japan and secured our Hawaiian outposts from any danger of invasion. (See Communiques Nos. 1-5 of Admiral Chester W. Nimitz, Commander in chief, U. S. Pacific Fleet and Pacific Ocean Areas, issued June 4-6, 1942; also article by Major General Willis H. Hale, Commanding General, U.S.A. 7th Air Force, Army & Navy Register, Vol. 65 No. 3352 of March 4, 1944.) Nevertheless the General continued on issuing his exclusion orders and in transferring citizens from assembly centers to relocation centers. Our invasion of the Solomon Islands in July-August, 1942, threw the Japanese back and secured our lines of communication to Australia. Nevertheless the General continued on issuing exclusion orders and in transferring citizens to relocation centers. When

the last of these people had been confined to a relocation center on October 27, 1942 (*Final Report*, p. 158) even though the mainland United States was secure from danger of any invasion and even from the possibility of an isolated attack by airplanes that might have attempted to reach our shores, the General was insistent upon the incarceration of these people. Is it credible that he believed these people were bent upon acts of espionage and sabotage? Can it be doubted that his whole evacuation program was the product of his violent prejudice against these people?

On October 29, 1942, the General removed his restrictive measures taken against Italian nationals and on December 29, 1942; he lifted the curfew restrictions on German nationals. He failed, however, to remove any of the restrictions placed upon American citizens of Japanese descent which indicates his prejudice against them had not abated.

SUMMARY OF ARGUMENT.

The appellant contends that the statute under which he was convicted and placed on probation is void for uncertainty and for delegating unlimited legislative power to military commanders, courts and juries to determine what acts shall be deemed to be criminal and punishable. He also contends that it is void for delegating unlimited judicial power to a military commander to sit in judgment upon him, to prejudge him without trial and to condemn him to exile. He also contends that the military orders command

ing his banishment from an area free from martial rule and ordering his imprisonment in a concentration camp, in the absence of crime upon his part and without an accusation of crime being brought against him, and the statute as their enforcement machinery, are void for being repugnant to the provisions of the 4th, 5th, 6th, 8th and 13th Amendments.

ARGUMENT.

I.

THE PRESIDENT NEITHER AUTHORIZED NOR APPROVED THE PROGRAM.

The evacuation plan originated neither with the President nor with the Congress. It does not appear that either division of government was apprised of the true nature of the plan until it had been put into operation. Although neither interfered their non-interference is not equivalent to approval or ratification. Neither the advice nor the approval of either was solicited prior to its institution. Executive Order No. 9066 was not personally prepared by the President. It was prepared in the War Department for his signature. (*Final Report*, p. 25.) It does not disclose on its face that a vicious discriminatory program to banish and imprison these people was contemplated. Taken at its face value it authorized the prescription of necessary military areas immediately encompassing necessary national defense materials, premises, and installations, the exclusion of any or all persons therefrom and the employment of federal agencies and

means to provide necessary "transportation, food, shelter and other accommodation" for residents who might be excluded therefrom. It did not give the General either military custody or jurisdiction over citizens or authorize him to regulate their movements.

It does not seem credible that the President expected the commander to exclude persons indiscriminately from the immense geographical areas prescribed by General DeWitt. It could scarce be expected that this order, by a fair construction of its language, would put him on notice of the unexpressed intentions of this military commander. Under the press of the business and duties of his office at the time he could not be expected to scrutinize the order with the nicety and precision necessary to disclose the subtle plans of the commander. There appears to be no reliable evidence that he has ever approved the sorry action. His failure to intervene and put a halt to it when first it became known to him does not signify approval on his part of the plan adopted or the policy pursued under the guise of his order. It has been characteristic of him that he seldom has meddled in the affairs of military commanders, seemingly leaving it to our Courts to determine whether they have overstepped the allowable limits of military discretion, a matter always reserved to the Courts for judicial review. (*Sterling v. Constantin*, 287 U. S. 378.) (General DeWitt has been removed from the Western Defense Command however.) Nothing in the order itself authorizes a discriminatory mass exclusion on the basis of the old nationality of one's forebears—nothing

therein authorizes the deportation and detention of any person. The most that can be said is that it authorizes the removal of certain persons from limited military areas to the outskirts of the areas and no farther. Nothing therein authorizes a commander of a Military Department to prescribe military areas of states-embracing extent or to establish prohibited military areas therein except those which might be limited to the immediate locality where national defense material, premises, and utilities are situated, around which military guards might be posted to protect them against espionage and sabotage.

If it be argued that the President was informed of the plan and approved it in its entirety we must examine into his powers to ascertain whether he may wield any such authority. What he cannot do military commanders under him who constitute a part of the executive division of government cannot do. Executive Order No. 9066 does not assert it was executed under authority of the Alien Enemy Act. With or without such a declaration, however, the President could authorize the removal and detention of alien enemies by presidential warrants. It is probable that he is authorized to dispense with individual warrants and remove them *en masse*. He did not, however, issue such warrants and there appears to be no evidence that he authorized General DeWitt to remove them from the forbidden areas set up by the General or to detain them. Alien enemies were excluded from the restrictive zones set up by the Attorney General, however, the removal being referable directly to the

Alien Enemy Act. The presidential order declares that its authority is that vested in him by the Constitution. Consequently, in so far as it might be asserted to authorize any control over citizens, if it has constitutional sanction, it must be that he invoked his powers to issue it either in his capacity as President or as Commander-in-Chief of the Army and Navy, the latter including the Marine Corps and the Coast Guard.

His powers as President are civil powers circumscribed by the Constitution—his powers as Commander-in-Chief are military powers circumscribed by law. As President his civil authority over civilians is limited to the execution of the laws enacted by Congress. As Commander-in-Chief he exercises a limited authority over only members of the federal armed forces on the active list. The title originally was not designed to confer authority upon him to direct the activities of troops in the field in wartime but to permit him, as the chief civilian selected by the voters, to outrank all our military and naval commanders. Primarily it had social and political significance. As our military might is now more highly organized it has come to be an accepted practice for him to act as arbiter in disputes among commanders and to deputize trained officers to command the different spheres of military operations. This operates as a check upon the personal ambitions of unscrupulous military leaders who otherwise might aspire to the office of dictator and, backed by bayonets at their disposal, attempt a *coup d'état* to finish repub-

lican democracy. Realizing that the Ship of State might veer from its true constitutional course if freak military winds were applied to its sails the Founding Fathers took these steps to safeguard the Republic. The limits they placed on executive power were planned to prevent dictatorship. They planned wisely. (See Art. IV, Sec. 10 of *Hamilton's First Plan of Government* and *The Federalist*, No. 74.)

It were a novel concept that the Chief Executive, either in his civil capacity as President or in his military capacity as Commander-in-Chief might treat civilians as being subject to his rule without Constitutional or Congressional authority. It were novel, indeed, were the existence of a state of war which vests in him the disposition of the military power would vest in him unlimited power and control over civilian activities and properties and enable him to delegate these powers either expressly or impliedly to his subordinates. No such power is conferred upon him for such would amount to an outright suspension of the Constitution. No such power has been conferred upon him by Congress for such would amount to a delegation of power not lodged in Congress and, in effect, would constitute an abandonment of its constitutional duties and automatically elevate the Commander-in-Chief to the position of dictator and his military commanders to feudal chieftans. If the Commander-in-Chief had any such power over civilians there would be nothing to prevent him from commanding all voters to vote for him at the coming election and, in the event of disobedience to his com-

mand, to imprison the disobedient in concentration camps or have them shot in manner following the Nazis. The only method of prevention of such occurrences would be the constitutional power to impeach him which could be circumvented by like treatment or by ordering them enrolled in the military forces. We hope America never reaches such a state. In neither capacity is the President the "ruler" of the American people. What he is not permitted to do no military commander may do with impunity. The sufferings of 1775-1781 were a hollow mockery were our Courts to allow military power to override civilian right upon the pretext offered by an obscure military commander that a spurious military necessity called for a suspension or destruction of all the constitutional rights and liberties of a segment of our citizenry upon an ancestral origin basis.

Protection against espionage and sabotage in civilian ranks is a civil duty lodged in the Department of Justice. The military authorities have the right lodged in them by Congress under constitutional sanction to try offenders in the armed forces for certain specified offenses committed on military reservations, but the majority of crimes committed by military personnel are triable only in the federal and state Courts. The only exceptions are offenses triable by martial law tribunals. Citizens outside a theater of war are not triable by military tribunals. (*Ex. Parte Milligan*, 4 Wall. (U. S.) 2.) Protection against espionage and sabotage in civilian ranks is not a military function. If a military commander may usurp these functions he

might as well take over the general police functions of the civil authorities and arrest and try civilians for vagrancy and other civil offenses. If a military commander, with or without presidential or congressional consent, can take over these duties and do these things with impunity we may as well acknowledge that our government has ceased to be a republic under a constitutional form and admit that even the pretense no longer is apparent and that what we have is a dictatorship distinct from the European and Asiatic types only in the hollow form that is held up to public gaze. Is war power to be regarded as a shallow excuse to hide the fact of dictatorship? Are Congress, the Courts and the Nation so impotent they are to be deemed parts of the tail to a military commander's kite either in war or in peace?

II.

THE CONGRESS NEITHER AUTHORIZED NOR APPROVED THE PROGRAM.

Public Law No. 503 was enacted on March 21, 1942. It was designed to be the enforcement machinery for military orders which might be issued to exclude certain individuals from limited military areas immediately encompassing national defense materials, premises and utilities. No exclusion order had been issued at the time, the first issuing thereafter on March 24, 1942, covering a removal of persons from a small area containing defense installations. Apparently, therefore, Congress and the President who approved

the statute understood that it was to be used for this limited purpose. They did not dream that General DeWitt would utilize it to put into operation an indiscriminate mass evacuation and imprisonment of a segment of our citizenry from a states-embracing military area upon an ancestral basis without affording the affected citizens a hearing on the question of the necessity of their removal.[16]

In this statute Congress did not confer an unlimited authority upon the military commander to set up extensive military areas of a states-embracing nature in which his authority over civilians was to be unrestricted. It delegated no such power to the President. It did not authorize the military commander to select citizens upon an ancestral basis for removal from military areas, to segregate and quarantine them and to detain them in concentration camps. It did not give him military custody of these people or mili-

[16] When the proposed bill was pending in the House and Senate it was stressed that it was intended to apply only to the removal of certain individuals from limited areas. See letter of March 9 of the Secretary of War to the Speaker of the House, H.R. 2124, p. 167; U. S. Code Cong. Serv. No. 3, p. 2544; and his letter of March 14, 1942, to the House Committee on Military Affairs stressing the proposed statute was for the purpose of enforcing "curfews and other restrictions" with respect to persons. H.R. 2124, p. 168; H.R. 1906, March 17, 1942. This limited purpose of the proposed legislation was emphasized. See 88 Cong. Rec. part 2, pp. 2772-2775; H.R. 1906, pp. 2-3. Neither branch of Congress appears to have been informed that it would be used to compel an indiscriminate mass banishment and imprisonment of citizens on a race basis so as to render it a bill of attainder. If this evacuation of citizens was not inspired solely by reasons of prejudice against Americans of Japanese lineage why were Congress and the President kept in the dark as to the facts that the statute and presidential order were to be used to cause their mass banishment and detention?

tary jurisdiction over them. It delegated no such power to the President or to any military commander. Public Law No. 503 did not constitute a ratification of any such power to be wielded under Executive Order No. 9066 or authorize the President to exercise any such control over them. Neither the presidential order, if it can be said to authorize the issuance of discriminatory exclusion orders, nor the exclusion orders were ratified by the statute insofar as they pertain to citizens.[17] Civilian Exclusion Order No. 34 was issued 43 days after the statute was passed. Ratification validates prior but not subsequent executive action. Even prior executive acts cannot be validated by congressional legislation when they involve the destruction of fundamental constitutional rights. (See rules in *Swayne & Hoyt v. U. S.*, 300 U. S. 297, and *Graham v. Goodcell*, 282 U. S. 409.)

Civilian Exclusion Order No. 34 issued on May 3, 1942, that is, 43 days after the statute was enacted. It commanded the appellant to be ready for evacuation on May 9th, that is, 49 days after the passage of the statute. The statute does not incorporate this order by reference and could not for the order was not then formulated except, perhaps, in the brain of General

[17] The passage of statutes appropriating funds to house and care for the evacuees does not operate as a ratification of the banishing and imprisoning orders. The appropriation of funds to maintain our jails does not operate as a ratification of the facts and laws under which convicts are incarcerated. If it did, prisoners wrongfully convicted and restrained of their liberty would have no redress either by appeal or by writ of habeas corpus. Such statutes, so construed, would violate the prohibition against *ex post facto* laws set up in Section 9 of Article I of the Constitution. See *Viereck v. U. S.*, 318 U. S. 236.

DeWitt. If it were arguable that it was passed with the intent to incorporate an unknown exclusion order dependent upon his whim it is void for uncertainty under the well-settled rule of law that an Act which purports to adopt provisions which may or may not be enacted *in futuro* is void for uncertainty. (*Ex parte Burke*, 190 Cal. 326, 328; *Rose v. U. S.*, 274 Fed. 245, cert. den. 259 U. S. 655; 59 *Corpus Juris* 618, sec. 174 (3).) It would not enable it to be known what was commanded or forbidden. The statute mentions military areas prescribed or to be prescribed in the future but leaves them undescribed. It mentions unknown restrictions that may or may not be declared *in futuro* to be applicable to civilians therein through the medium of military orders not *in esse*. Consequently, it is unconstitutional and void for being vague, indefinite and uncertain in that it fails to prescribe any military areas by description and fails to specify any specific restrictions upon the activities of any person therein.

An examination of the statute reveals that it does not delegate to the President or to any military commander an authority to prescribe military areas or to restrict the activities of any citizen therein. It does not set up any standards, guides or policy for a military commander to follow or to which he is to conform. These are necessary conditions precedent to enable an executive or military officer to wield a *limited discretionary authority* in the enforcement of congressional legislation. (*Schechter Poultry Corp. v. U. S.*, 295 U. S. 495; *Panama Refining Co. v. Ryan*,

293 U. S. 388.) The military orders involved herein were expressions of legislative power usurped in violation of Article I of the Constitution. They are void as products of legislative power lodged exclusively in Congress.

Even if the statute be read in conjunction with Executive Order No. 9066 this defect is not cured. Neither sets up any standards, guides or policy for a military commander to conform to or to follow. This failure did not lodge unlimited or arbitrary authority in General DeWitt's hands to be wielded as caprice might dictate. Even though they were construed in the *Hirabayashi* case to uphold a curfew discriminating against citizens on a racial basis, for a limited period of time as an emergency war measure under the peculiar set of circumstances assumed in that opinion to have existed, the statute and presidential order would not seem to have been designed to enable banishment and imprisonment to be inflicted upon citizens. The Constitution is not suspended by the existence of a state of war. Extra-constitutional powers may not be wielded by divisions of our government. General DeWitt's program struck at the very roots of fundamental constitutional rights and liberties. The whole of his program was unlawful in conception and execution.

III.

CONSTITUTIONAL RIGHTS VIOLATED.

The statute, Public Law No. 503, was applied as the enforcement machinery for Civilian Exclusion Order No. 34, the military proclamations and orders which were designed and scheduled to banish the appellant and similarly situated citizens from the Pacific Coast and to imprison them in concentration camps. The purpose to which the statute, proclamations and orders was put, insofar as they affected the appellant and other American citizens, was unlawful from its inception. The consequent curtailment of the appellant's liberties and the deprivation of his rights of national and state citizenship are irreparable. As applied to the citizen appellant the statute and the military proclamations and orders to which it gave effect are unconstitutional and void upon the following grounds:

1. For delegating to military commanders, Courts and juries the legislative power to determine what are military areas and what acts or omissions therein on the part of the appellant shall be deemed criminal in nature and punishable, in violation of Section 1 of Article I of the Constitution. (*U. S. v. L. Cohen Grocery Co.*, 225 U. S. 81.)

2. For delegating unlimited judicial power to a military commander to function in lieu of Courts by enabling him to hold, in the recesses of his own mind, a mock trial of the citizen-appellant and other citizens of like stock, in an area free from martial rule and to condemn them to deportation and imprisonment on

mere suspicion or hearsay or simply because he harbors prejudice against them because of their Japanese ancestry, in violation of Section 1 of Article III of the Constitution. (*Ex parte Milligan*, supra.).

3. As constituting a bill of attainder forbidden by Section 9, clause 3 of Article I of the Constitution in that it aided, enabled and encouraged the military commander to banish him not for the commission of a crime but solely by reason of his type of ancestry. (*In re Yung Sing Hee*, 36 Fed. 437; 16 *Corpus Juris Sec.* 902-3.)

4. As aiding the military commander to seize his person without legal process and without probable cause in violation of the unreasonable search and seizure clause of the 4th Amendment.

5. As depriving him of the following, among other, inalienable rights of national and state citizenship in violation of the due process clause of the 5th Amendment. The "rights so vital to the maintenance of democratic institutions." (*Schneider v. Irvington*, 308 U. S. 147, 161.) The right of the citizen "to live and work where he will". (*Allgeyer v. Louisiana*, 165 U. S. 578, 589.) The right "to establish a home". (*Meyer v. Nebraska*, 262 U. S. 390, 399; *Colgate v. Harvey*, 269 U. S. 404.) The right to "freedom of movement". (*Williams v. Fears*, 179 U. S. 270, and concurring opinions in *Edwards v. California*, 314 U. S. 160.) See also the discussion of these rights in *Corfield v. Coryell*, 4 Wash. (U. S.) 371; *U. S. v. Cruikshank*, 92 U. S. 542, and *Holden v. Hardy*, 169 U. S. 366, 389.

6. As depriving him of his right to work and to the fruits of his labor without due process of law in violation of the 5th Amendment. These are property rights. (*Truax v. Raich*, 239 U. S. 33, 38.) Inasmuch as General DeWitt's orders assert that the deprivation of these property rights was necessitated for a public purpose the deprivation constituted a taking of private property for public purposes without just compensation in violation of the 5th Amendment. It is also to be noted that Public Proclamation No. 3 deprived the appellant of the possession of articles of personal property which the General characterized as contraband in his hands without, however, depriving white citizens in the same area of similar personalty.

7. In denying him the equal protection of the laws which is implicit in the due process clause of the 5th Amendment. (*U. S. v. Yount*, 267 Fed. 861; *Sims v. Rives*, 84 Fed. (2d) 874, cert. den. 298 U. S. 682.) Due process of law forbids racial discrimination. (*Yu Cong Eng v. Trinidad*, 271 U. S. 500, 528.) Although the equal protection clause does not appear in the 5th the legal significance of the due process clause in the 5th and 14th Amendments are identical. (*Heimer v. Donnan*, 285 U. S. 312; 16 *Corpus Juris Secundum* 1141.) The utter inequality which has been practiced herein would seem to violate the due process clause of the 5th Amendment for due process is synonymous with "law of the land" which, in America, cannot mean one law for one citizen and another for another citizen. The guaranty of due

process of law in the 5th Amendment was not originally designed to decrease but to expand the rights of a citizen.

8. As holding the appellant to answer for an infamous crime, the nature of which is unknown, in violation of the provisions of the 5th Amendment. Banishment is a type of infamous punishment forbidden by the 5th Amendment. (See *U. S. v. Moreland*, 258 U. S. 433.)

9. As subjecting him to deportation and internment without charging him with crime and without informing him of the nature and cause of any accusation against him and without affording him a fair trial on the question of the necessity and right to banish and intern him, in violation of the 6th Amendment. The denial of such a fair trial also violates the due process clause of the 5th Amendment. In issuing and enforcing his penal *lettres de cachet* against the appellant and similarly wronged citizens the General prejudged him and them in the secret recesses of his own mind and condemned them to deportation. Even if he is a self-appointed military tribunal no such power is lodged in him by the Constitution or by statute. (*Ex parte Milligan*, supra.)

10. As inflicting upon him the cruel and unusual punishment of banishment and internment in the absence of crime upon his part and without an accusation of wrongdoing being brought against him, in violation of the 8th Amendment. (See discussion by Mr. Justice Brewer in *U. S. v. Ju Toy*, 198 U. S. 253, 269-270; also see, *Ex parte Wilson*, 114 U. S. 417, 428.)

11. As imposing upon him in an internment camp a condition of slavery and involuntary servitude, imposed not for crime but solely by reason of his type of ancestry, which is forbidden by the 13th Amendment. (See *Slaughter-House Cases*, 83 U. S. 36.) In the W.R.A. camps the internees have been put to work assigned by the authorities in charge at peon wages. (See *W.R.A. Manual*, Chap. 50.5, paragraph .6-A et seq. As an unskilled person the appellant was scheduled to receive not more than $12 per month for devoting 8 hours per day to such labor.

12. As working a corruption of blood and forfeiture upon him, without trial, upon the theory of the constructive treason of his remote ancestors which is forbidden by Section 2, clause 2 of Article III of the Constitution. (*Shortridge v. Macon*, 22 Fed. Cas. No. 12,812; *Ex parte Bollman*, 4 Cranch 75, and 63 *Corpus Juris* 814.)

The conclusion seems inescapable that Congress did not authorize or approve the banishment and imprisonment of these citizens. It does not meddle in the programs of executive and military officials. It is powerless to take action against them except that it may impeach them or reduce their compensation. It is not part of its province to halt the action of military commanders or to encroach upon the executive and judicial fields. Although it is reluctant to criticize executive officers it is generally the butt for criticism from official sources. It does not intervene upon behalf of an abused citizenry. By legislation, however, it can provide compensation for injuries suffered, a duty it

yet must perform for the citizens who have been impowerished by General DeWitt's action taken against them under the pretext of color of authority of the United States.

Neither Congress nor the President were originally apprised that General DeWitt intended to evacuate all persons of Japanese ancestry on a wholesale basis. Neither of them nor any military commander is authorized to discriminate against these citizens on the basis of the nationality of their ancestors. If the due process clause of the 5th Amendment is to be used as a device to do this it is time we stopped teaching our children that the Constitution has any significance and that the Bill of Rights is a charter of our rights and liberties. We should tell them instead that arbitrary power is lodged in each Administration that captures or falls heir to the reins of government. If this terrible imprisonment program is valid we should call a Constitutional Convention to write another Constitution which will tell us the harsh truth.

There was no substantial basis for a belief upon General DeWitt's part that any threat of espionage or sabotage to our military resources from the appellant or any of these evacuated citizens was real or imminent or that he or they presented any clear and present danger to national security. Civilian exclusion orders issued against individuals have been held void upon the ground that at the time of their issuance there was not present a substantial basis for the judgment of a military commander that a threat of espionage or sabotage to our military resources was real and im-

ment. *Schueller v. Drum*, 51 Fed. Supp. 383; and *Ebel v. Drum*, 52 Fed. Supp. 189. That there never has been a threat of espionage or sabotage on the part of the appellant or upon the part of any of the similarly evacuated citizens and aliens is demonstrated by the facts that the General has never accused one person of any such acts and that none of these people has ever been charged with the commission of any such acts, although opportunities were available if any were bent upon such acts.

The General prejudged these people *en masse* and sought their banishment from the Pacific Coast. That his whole brutal evacuation program was the result of his personal prejudice against them and not in anywise based upon any facts whatsoever that would form a rational basis for this program appears from an examination of his *Final Report* on the subject. His testimony before the House Naval Affairs Subcommittee on April 13, 1943, demonstrates his action was inspired by prejudice. See quotations from his testimony on page 33 of the appellant's petition for writ of certiorari herein. The persistent refusal of General DeWitt and his successors to revoke the exclusion orders for the deportees found to be loyal by the W.R.A. is evidence the motive that inspired their issuance was nothing but prejudice.

IV.

WHY MILITARY FORCE REPLACED CIVIL AUTHORITY.

It is significant that neither the President nor Congress has ever given any expression of approval of the evacuation program. Neither the proclamations nor the exclusion and detention orders of General DeWitt had a reasonable relation to the declared purposes of Executive Order No. 9066 or to national security. The presidential order was used as an excuse to cause the permanent banishment of these people from the Pacific Coast and the imprisonment of 73,000 citizens without cause to the everlasting disgrace of America. We assert that this program was not put into execution because of a bona fide military necessity conceived in good faith. The test whether military action transgressing civilian rights is justified is not whether it was conceived in good faith but whether it was conceived in good faith coupled with sound discretion and based upon solid and substantial facts demonstrating its imperative application for national security reasons. Is a military commander's assumed reputation for infallibility as to what is a military necessity of more importance than the rights of 73,000 citizens that a Court must accept his judgment as final without inquiring into the facts upon which the asserted necessity is based? Is good faith and sound judgment on the part of the General to be assumed and the good faith and loyalty of injured citizens to be doubted? General DeWitt's *Final Report* proves he had a passion for deeds but not for substantial facts.

Was General DeWitt so blind that he didn't realize that in the interval between December 7, 1941, and the date each of his unprecedented orders issued civilian boards of investigation could have examined into the loyalty of each of the prospective deportees if he didn't wish the Army to conduct them?[18] They could have been examined in less time than the months it took to build the shacks that were to house them. The inconvenience and cost of examining would have been trifling. The cost of the housing, evacuation and administration of his program has cost this country many millions. The loss of their services has been a national calamity. Did he flout civilian authorities because he believed they were incompetent and he alone competent to judge? Why did he keep secret the reasons he insisted upon this frenzied evacuation? How could this nation abide the secret reasons he carried in his head when we had neither evidence nor ground to believe him to have been the wisest man in the nation? What are the facts upon which he would justify the outrage he perpetrated? This Court no longer needs to resort to speculation as to what those

[18]The General issued several hundred individual civilian exclusion orders against "white" naturalized citizens of prior German and Italian allegiance, whom he deemed dangerous. These first were given individual hearings on the question of their loyalty by boards consisting of three Army officers. With a few exceptions these orders issued against naturalized citizens against whom the Attorney General later instigated denaturalization proceedings. The majority of these orders appears to have been revoked. If the General had time to provide examinations for these individuals can he be heard to deny he had time to examine Japanese descended citizens before evacuating them? His special treatment of these whites proves his bias against the native born yellow citizen.

reasons were, if reasons they can be termed, as it was impelled to do in its opinion in the *Hirabayashi* case which involved the validity of a curfew imposed upon alien enemies and citizens of Japanese descent in a military area. When that case and the *Yasui* case (*Yasui v. U. S.*, 320 U. S. 115) were argued the General had not made known his reasons. He left it to judicial hypothesis to discover grounds to justify his assertion that a bona fide military necessity existed for his action. We find what he offers in lieu of reasons in his "*Final Report*"[19] on the Japanese evacuation from the West Coast first made public on January 19, 1944, two years after the evacuation was completed. His strange silence for this period is explainable on no grounds except prejudice against these deportees. The document asserts his military excesses are to be ascribed to his astuteness and sagacity, products of reason. His report demonstrates them to have been born of bias and war hysteria, products of emotion. What he offers therein does not permit an honest conclusion that his revolting program was based upon an exercise of sound discretion and mature judgment. It proves the prattle of military necessity was medicine he wished the public to swallow, prescribed for a non-existent disease. The public hypnosis that followed his punitive orders was caused by fear of invoking military wrath. The silence of

[19]This is not an official government report. It is a self-serving document of a subordinate general to his superior officer offered in anticipatory defense to expected charges of wrongful action. It never has been submitted to the Attorney General or to the President for approval and has never been officially approved

the victims was caused by fear that military reprisals might be taken against them. The program was inspired by prejudice, the fierce tyranny of prejudice of the military commander and nothing else. We were intellectually dishonest were we to deny the fact.

Oppression is not excused by presuming the General acted in good faith. Such would be tantamount to presuming that the oppressed were guilty of conduct justifying arbitrary military action against them, that is, that they were guilty of criminal acts which necessitated the use of military force against them. It is never "good faith" that is justification. Good faith has caused the extermination of too many millions of innocents during the past 6000 years. It is usually an excuse offered to save the reputation of evil doers. Thousands of good citizens have been impoverished and thousands of innocent lives have been ruined by General DeWitt. His recklessness is not equivalent to good faith. There may be a few who smirk over the irreparable injuries suffered by these people but those who do never have understood and never will understand that this Republic stands for equality in the treatment of its citizens.

Prejudice inspired the program.

In this fantastic colored report he informs us his frantic program was carried into execution simply because he entertained a belief that the "distribution of the Japanese population" on the Pacific Coast "appeared to manifest something more than coincidence." His statement is pregnant with unmeaning

ful not to our security but to the conscience of this nation. We are to infer that he attributes a sinister meaning to this distribution. It is evident, however, that he is unfamiliar with the history of these people on the Pacific Coast. From this peculiar manifestation, which seems to have been limited to him alone of all our military commanders, he drew the conclusion that this population was "ideally situated with reference to points of strategic importance, to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so." (See p. 10.) On page vii he states that 115,000 persons of Japanese ancestry resided along the Pacific Coast and "were significantly concentrated near many highly sensitive installations essential to the war effort." His suspicions evidently are confined to these people whether alien or citizen.[20] He entertained no like suspicion of German and Italian nationals and their issue in the areas which is peculiar to say the least. Did he think we had everything to fear from these people and nothing from the fascist and nazi-minded alien zealots here and their "white" sympathizers? Nothing in his report in anywise substantiates the existence of a clear and present or potential danger to our military and defense resources from citizens of Japanese pedigree or from the aliens who were evacuated. The most that can be gleaned from his report is that he con-

[20]The tens of thousands of white neighbors and friends who visited these people in the assembly centers seems to be ample proof that those who knew them best did not view them in the same sinister light as General DeWitt and various the

ceived of a disease, prescribed a radical remedy and when the patients had passed out he searched about for facts and reasons to render a diagnosis. If it hadn't been for the General's announcement that he intended a generalized evacuation of these people there would not have been a Japanese problem at all. The announcement of his prospective venture into injustice created the problem and many witnesses rushed into the Tolan Committee hearings to voice their suddenly discovered *suspicions* of these people. The ignorant and the prejudiced are quick to see an enemy in their neighbor when someone first has attached the label.

Evidently he expected substantive rights to be surrendered while the crust of procedural right was to be preserved to the affected citizens in the form of applications for redress to courts as a useless process to be followed to satisfy legal formalism. Apparently he believed our Courts, by a resort to legal gymnastics, would supply a factual foundation to support his deportation and detention orders. This must have been based upon the fallacious notion that in time of war a military commander's action is above criticism and beyond review. Apparently he was not familiar with the decision in *Sterling v. Constantin*, 287 U. S. 378, 399, wherein this Court declared that "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." Did he expect a military blunder of magnitude to be justified by a Court on the fiction that an executive official as a subdivision of the executive branch of government can do no wrong?

Did he not realize that a citizen's rights in America are not dependent upon the slant of his eyes, the color of his skin, the religion he professes, or the nationality of his ancestors?

When the agitation on the Pacific Coast against the Chinese reached its height Japanese workers were imported by the white farming elements to displace Chinese workers.[21] They came by invitation and solicitation and were welcomed by the whites as a source of cheap labor. The newcomers settled in agricultural and fishing areas where their services were needed and where they could follow the occupations in which they were experienced. In these areas a majority of them remained, their native-born children gradually emancipating themselves from the pursuits of their parents. When first they settled here their residential sections, habitations and social orbits were prescribed by their employers and by the social tabus of their "superior" neighboring whites. By dint of hard work and ceaseless energy a majority of them surmounted the environmental difficulties which had hedged them in and, in due course of time, many were able to move into industrial, commercial and professional fields and appreciably bettered their financial standing and social status. It is significant that on their arrival the areas recently prescribed as military areas contained no installations, equipment or materials then considered to be of a national defense nature. Sections 101, 102, 104 and 105 of Title 50, U. S. Code, were not then even

[21] See Cross, Ira B., "History of the Labor Movement in California", an excellent historical summary in H. Res. 2124, p. 59 et seq.

in a state of contemplation but were enacted many years later, in 1918. The General has mistaken symptoms, easily explained and wholly familiar to those acquainted with the history of the Pacific Coast, for a disease which had no existence outside his own mind.

It never occurred to him that the labor of these deportees was national defense material with which he recklessly dispensed. His conclusion that the distribution of these people on the Pacific Coast "appeared to manifest something more than coincidence" was a spectre of his own creation. His qualified conclusion that these people were ideally situated to embark upon a tremendous program of sabotage "should any considerable number of them have been inclined to do so" is an hypothesis based entirely upon prejudice and base suspicion. It is an escape from fact and reality. Suffice to say that it was and is the duty of our civil authorities and not of General DeWitt to guard us against criminal acts upon the part of subversive persons within civilian ranks.[22] These authorities have been competent and faithful in the performance of their duties. Both by training and experience they were better able to cope with the problem than General DeWitt whose interference with their duties was not solicited but was

[22] General DeWitt has never arrested one person proved to be guilty of any such crime. The remarkable record of the F.B.I. is adequate proof of its ability to control subversive activities. It was reserved for General DeWitt, however, to interfere with the Department of Justice in June, 1942, in allowing German and Italian alien enemies to return to the West Coast areas from which they had been excluded by the Attorney General.

resented. They did not call upon him or the W.R.A. to usurp their functions or to police the civilian population of the Western States. Neither did the public. It is significant that not one authentic case of espionage or sabotage upon the part of any of these evacuated citizens or aliens occurred prior to their involuntary removal or since.[23] General DeWitt must have been aware of this but, despite the fact, he proceeded apace brooking no opposition so determined was he on their banishment. Had any acts of espionage or sabotage to our national defense material, premises or utilities, as defined in 50 USCA, Section 104, been committed those guilty would have been punishable by 30 years' imprisonment in a federal penitentiary and a $10,000 fine under Section 102 or by a like sum and 10 years under Section 105. A conspiracy to commit any such crime would have fetched 2 years' imprisonment and $10,000 fine under 18

[23]This is a fact too well settled to admit of dispute or doubt. See dissenting opinion of Denman, C.J., R. 42, pointing out that the government admitted "that not one of these 70,000 Japanese descended citizen deportees had filed against him in any Federal Court of this circuit an indictment or information charging espionage, sabotage, or other treasonable act" during the period from December 7, 1941, to May 10, 1942. The Tolan Committee Report, H.R. 2124, pp. 49-59, proves no such acts had been committed in Hawaii. Colonel Kendall J. Fielder, who had charge of military intelligence of the U. S. Army in Hawaii, in a letter to Mr. Charles L. Loomis dated May 17, 1943, states, "Having been in charge of military intelligence activities since June, 1941, I am in a position to know what has happened. There have been no known acts of sabotage, espionage or fifth column activities committed by the Japanese in Hawaii either on or subsequent to December 7, 1941." See record on appeal in the Circuit Court of Appeals for the Ninth Circuit, in *Duncan v. Kahanamoku*, Case No. 10,763, page 687. The Roberts' Report, Sen. Doc. No. 159, 77th Cong., 2nd Sess. 1942, does not charge any citizen or alien resident with disloyal acts. It charges alien spies attached to the Japanese consular offices with espionage. (See pps. 12-13)

USCA, Section 88. In addition, criminals guilty of disloyal acts could be punished for sedition (50 USCA, 33, 34) and treason (18 USCA, 1, 2). Adequate punishment can be inflicted by our civil Courts after trials wherein due process of law is safeguarded and where the accused or suspected person has an opportunity to prove his innocence. The penalties attaching to such prohibited acts are adequate deterrents to crime.

Had any of these deportees actually been suspected of the commission of any of these crimes or of a conspiracy to commit any such crime they ought to have been charged therewith and to have suffered trial thereon by our Civil Courts and upon conviction have suffered a severe punishment commensurate with the gravity of the offense. Without any such accusation a whole body of persons indiscriminately was picked up under General DeWitt's orders and was confined to concentration camps where scarcely any intelligent attempt has been made to segregate those loyal from those actually disloyal or the criminal from the innocent. The brand of possible disloyalty which the W.R.A. attaches to a few who are confined to the Tule Lake Segregation Center is an arbitrary classification given to all deportees to whom it denies leave clearances, the denials being made for the shallowest type of reason. In a high-handed fashion it has segregated those whom it would impliedly classify as disloyal upon secret evidence without hearing. (See *W.R.A. Manual*, Chaps. 110 and 60.10.) The General and the W.R.A. would have us believe they went on a tiger hunt but the only trophies they exhibit are a few rabbit skins.

The subterfuge of military necessity exposed.

What one day will be celebrated as a masterpiece of illogic but, which is corroborative evidence this frenzied banishment was based upon prejudice appears in General DeWitt's letter of February 14, 1942, to the Secretary of War, one month and a half before the evacuation commenced. (*Final Report*, p. 34.) He characterizes all our Japanese as subversive in this letter by referring to the subject of "Evacuation of Japanese and other Subversive Persons from the Pacific Coast". He states in the context thereof that "the Japanese race is an enemy race" and the native-born are citizens and "Americanized", their "racial strains are undiluted" and being "barred from assimilation by convention" may "turn against this nation" upon which he concludes:

> "It; therefore, follows that long the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

It is amusing as well as tragic to learn that he considers innocence to be an indication of brewing crime. He sheds no light on these apparitional "indications". Can it be said that his own statements as to what inspired him to order this banishment in anywise suggests he was actuated by proper motives or that it was based upon an exercise of sound discretion and

mature judgment? Certainly it was not the action taken by him that explains the absence of espionage and sabotage upon the part of these deportees—it was the innate loyalty of these citizens and the friendly attitude of the aliens that accounts for it. Opportunities were available for the commission of hostile acts before and after the evacuation took place had any desired to commit them. He doesn't accuse them of being unloyal or disloyal which might be exemplified merely by harboring thoughts. He accuses them of being openly or covertly hostile and consequently ready and capable of overt treasonable acts against our security. His suspicions are purely imaginative. We do not hesitate to state that never did a Nazi official in Germany draw more unjust conclusions than General DeWitt who would punish these people not for harboring dangerous thoughts but for thoughts he would imbute to them or project into their minds. He did not order German and Italian nationals and their native-born offspring driven from homes and imprisoned—their numbers are legion, therefore, he must have concluded that their numerical strength guaranteed their loyalty, a strange conclusion. Moreover, the government of no modern civilized country dares to transport millions of its inhabitants into exile—the political repercussions in a democracy would remove an administration from office, probably without relying on ballots. An unorganized minority is always the object of oppression. In Germany it was Jews. Here it is Americans whose ancestors were Japanese subjects.

General DeWitt adjudged these people guilty by his suspicion that they might have associated with a few persons in their midst who might have harbored dangerous thoughts against this nation. Individual guilt is the test for a deprivation of rights. (*Ex parte Quirin*, 317 U. S. 1.) Apparently guilt by possible association with unidentified persons of possible criminal tendencies arising out of possible ethnic affiliation is a new type of crime. It was made so by General DeWitt. Has he taken over the duties of Congress? He pronounced them guilty and imposed punishment. Has he taken over the duties of the Courts?

He has the temerity to declare these people were traitors to this nation. Why doesn't he tell this to the 100th Infantry Battalion—to the 442nd Combat Team—to the wounded—to those American youths of Japanese ancestry who have died that America might survive? All America and our Allies are grateful to these youthful warriors except, apparently, General DeWitt and a scattered few others whose prejudice blinds what reason they possess.

He tells us on page 18 of his report that there "were many evidences of the successful communication of information to the enemy, information regarding positive knowledge on his part of our installations". He doesn't tell us who communicated this information, however, or when it was communicated. He states that the "most striking illustrations of this are found in three of the several incidents of enemy attacks on West Coast points". These incidents he recites in his

list are as follows: (1) On February 23, 1942, an unidentified submarine shelled a hill near Goleta, Santa Barbara County, California, without damaging any vital installation, this occurring at a time a shore battery was in the process of replacement. Nothing is said about negligence in leaving the spot undefended while replacing the battery or why our planes failed to put in an appearance and sink the submarine. (2) On an unspecified date what is suspected might have been an enemy submarine-based plane might have dropped incendiary bombs in an obscure Oregon area where a forest fire might have been started. This, we are told, occurred in the only section of the Pacific Coast approachable by enemy aircraft without interception by aircraft warning devices. It would be peculiar that our enemies would attempt to start a forest fire by this amazing method when targets of much more importance might have been attacked. The report leaves much to be desired in the way of details and would seem to call for a more plausible explanation of the incident. (3) A hostile submarine shelled shore batteries at Astoria, Oregon, from the only place at which a surfaced submarine could approach the shore line close enough to shell coast defenses without being in range of coastal batteries. The date of this occurrence is left to surmise. It were strange indeed if our shore batteries at any point on our coast line did not have greater firing range than any guns an enemy submarine can carry. The public long has desired additional data on these reported incidents and long has

speculated on the announcements of their happenings and has never attributed any such occurrence to information communicated by any of our citizens or aliens to the enemy. The General had not the slightest evidence from which to infer that any of our citizens or Japanese aliens here were guilty of any such treasonable acts. It is to be noted that his report doesn't charge any Japanese alien or Japanese descended person with any such act either by direct statement, inference or innuendo. The recitation is an anomaly in his report.

In a footnote on page 8 of his report he informs us that after evacuation "interceptions of suspicious or unidentified radio signals and shore-to-ship signal lights were virtually eliminated and attacks on outbound shipping from West Coast ports appreciably reduced". He doesn't charge any alien or citizen of Japanese pedigree with signalling the enemy however. Had there been any signalling to the enemy by any person neither he nor the F.B.I. would have hesitated to arrest the guilty with or without search warrants and to have shot them or to have charged them with treason. No arrests were made. No one was shot. No charges were filed against anyone. A similar rumor of signalling which spread from Hawaii was proven to have no foundation in fact—on the West Coast the rumor rests on no firmer ground. It took time to convince the civilian public that black-outs and dim-outs were necessary precautions. General DeWitt had considerable difficulty putting these measures into operation. Full compliance was not obtained for some time

—but the delay encountered in convincing the public of the necessity for compliance with these measures is not to be construed as signalling to enemy ships. Perhaps the General's report confused this haphazard putting out of lights with signalling. He doesn't seem to have been aware, however, that in carrying out his evacuation program he put out the lamp of liberty. What prevented attacks upon our shipping off our coast was the appearance of a sufficient number of our airplanes on the West Coast and the setting up of an adequate off-shore patrol of naval craft and army planes. This vigilance has not relaxed. Detection of the presence of hostile craft by radar outmoded light signals.

The supposition that there were disloyal members among the ranks of these citizens whose numbers and strength could not be precisely and quickly ascertained would not justify the banishment and detention of a segment of our people. The same supposition may be applied to any portion of our population. It has no merit. There was ample time for General DeWitt to ascertain whether there were any disloyal persons in their ranks by Army hearing boards had he entertained a genuine belief in the presence of subversive persons bent on crime. He gave individual hearings to white naturalized citizens through Army boards he set up. A period of approximately four (4) months elapsed between December 7, 1941, and March 30, 1942, when the first evacuation took place. A period of five (5) months two (2) days elapsed up to May 9, 1942, which was the date the appellant was

ordered excluded from his home in Hayward, Alameda County, California, and into an assembly center. (See Civ. Exc. Order No. 34.) The last of the evacuees were not removed to an assembly center until the latter part of August, 1942. (See Civ. Exc. Order No. 108, 7 F.R. 6703.) The General exhibited not the slightest interest in having these people examined by Army boards—he was bent on their exile. Despite the fact that there was an ample and sincere public demand for the setting up of loyalty hearing-boards composed of civilians to determine the loyalty of these people, as the Tolan Committee Hearings prove (see H.R. 2124, pp. 28-30), the General turned a deaf ear to the proposals. He alone was to be the judge, jury and executer of his orders, a self-appointed one who thereby demonstrated his contempt for civil authorities and citizens' rights. Can a judicial tribunal assume that his attitude and action were the result of sound discretion and mature judgment? Can it be assumed judicially that the mere recital of military necessity in an order issued by a military commander affecting the rights and liberties of civilians in an area free from martial rule is indisputable evidence it was warranted by substantial facts?

A citizen's state of mind which might be characterized as *anloyal* wouldn't justify his banishment and detention and the brand of a criminal. Such a state of mind is negative and harmless to our security. A *disloyal* state of mind wouldn't justify such treatment because such a mental state, although denoting

dissatisfaction with our government and aims, is of a negative type and not a menace to our security. One, however, who is *hostile* to us and, in pursuance of his hostility, engages in overt acts presents a clear and present danger to our security and is triable for crime in our duly constituted Courts. A charge of *potential* unloyalty, disloyalty or hostility is based upon suspicion and prejudice. It is purely hypothetical—it would not justify a trial or mistreatment. It would pave the way for the grossest type of abuse. This is the sort of thing with which we are dealing.

We are not willing to trust all of our traditional constitutional rights to any military commander. We are not willing to vest in General DeWitt the right to determine who shall and who shall not enjoy the privileges and immunities of national citizenship. He is not infallible. A military man may be an authority on military matters but when he invades the domain of civil right he is usually in a maze. The American public does not worship at the shrine of any man. The banishment program was the product of the outright personal prejudice of General DeWitt against these people probably mixed with a vague suspicion he entertained of them based upon gross hearsay. Neither prejudice, suspicion nor belief in hearsay affords a rational basis for his constitution-destroying orders. The professional military mind notoriously holds civilians in contempt—it has been so during the ages and this is the chief reason why this republic was founded upon the theory that the military was subordinate to the civil authority. (See *Declaration of*

Independence, par. 14.) Whenever military orders clash with civilian right they must be scrutinized with the greatest of care and zealousness to protect the civilian against unjust encroachment. Must we stamp approval on military measures that oppress a minority of our citizens and satisfy our consciences by justifying it under the nebulous excuse that it was an expression of the war power? Injury is not excused by attaching to it a convenient but apologetic label. The military appetite is never satiated and seldom appeased where power is concerned.

In the Hawaiian Islands not one act of disloyalty has been charged to any of the Japanese inhabitants. A curfew regulation there was applied to all inhabitants without discrimination. Neither mass banishment nor internment was inflicted on citizens under the guise of a protective measure against threats of espionage, sabotage or other treasonable acts. Hawaii, it must be remembered, is an immense arsenal containing formidable military and naval installations and facilities for the production of defense equipment on a proportionate scale unmatched on the Pacific Coast. For a period of time, until June, 1942, when the battle of Midway was won, it was considered in danger of invasion attempts. Nevertheless, in the exercise of sound judgment and discretion our military and naval commanders there found no good reason to discriminate against citizens of Japanese ancestry or against Japanese aliens who made up 38 per cent of the population. General Robert C. Richardson, Commander Hawaiian Department, has

declared that the loyalty of the Japanese population in Hawaii has been "proved on innumerable occasions". (See record in *Duncan v. Kahanamoku*, appeal No. 10,763, U. S. Cir. Ct. Apps., 9th Circuit, p. 664.) Their loyalty is demonstrated by the fact that in March, 1944, there were employed in work on military installations in Hawaii some 6678 citizens of Japanese ancestry and some 743 Japanese aliens and on Navy projects 585 citizens of Japanese ancestry. (Ib. p. 1162.)

Can it be said that General DeWitt, in charge of military areas on the Pacific Coast which was not within a theater of war and which had not been in danger of invasion, had a rational basis for his arbitrary orders commanding the banishment and imprisonment of loyal citizens against whom not one accusation of crime was or could be made? Martial rule has prevailed in Hawaii ever since December 7, 1941. It was invoked under Section 67 of the Organic Act of Hawaii. (48 USCA, Sec. 532.) Whether it was properly invoked and is lawfully continued in force has not yet been finally determined. Martial law has never been proclaimed by Congress and martial rule has not prevailed on any part of the mainland United States. The reasonably prudent commanders in charge of our security in the battle zones and theaters of operation in the Central, South and Western Pacific areas saw no reason to discriminate against citizens of Japanese origin, but General DeWitt would discriminate against them in a military department far removed from the scene of active hos-

tilities and ask us to accept his judgment as final on the question of its necessity. Can it be doubted his orders emanated from his prejudice or unreasonable suspicion unsupported by facts?

On pages 105-106 of his report he asserts his reasons for ending "voluntary evacuation" and substituting "controlled evacuation" were (1) "to alleviate tension and prevent incidents involving violence between Japanese migrants and others" and (2) "to insure an orderly, supervised, and thoroughly controlled evacuation with adequate provision for the protection of the persons of evacuees as well as their property". However, it is a matter of common knowledge that there was no public tension constituting a menace to the security of these people and his program hasn't developed any, a few jingoist press rumors to the contrary notwithstanding. No overt lawless acts were committed against any of these people and no "incidents involving violence between Japanese migrants and others" had occurred. The illustrations to which he refers us to show the extent "to which vigilante activities were developing" is the Tolan Committee Report, Part 29, consisting of mere statements of four (4) persons protesting against dumping evacuees in small communities. Obviously protests would arise upon dumping evacuees upon small communities unprepared to house them and provide work for them for such would dislocate the economic and political structure of the communities. The public tension he refers us to seems to be the

tribulation of "an aged Issei couple and their family" in Santa Fe, New Mexico (outside DeWitt's department), where the "racial prejudice against the Hayakawas was so severe that the family petitioned Wartime Civil Control Administration requesting that they be permitted to join the evacuees assembled at Tanforan".

He cites the *Hayakawa* case as a lone example. The Hayakawas, *if possessed of means,* would have been welcomed in almost any mid-western and eastern locality where Japanese aliens and their native-born offspring have not been molested and where they have steadily devoted their efforts to the production of commodities and services in our war effort.

His solicitude for the property of these "evacuees" first found expression on March 13, 1942. (H.R. 2124, p. 182.) This occurred sometime after the majority of these "evacuees" had lost their properties to those human hyenas who preyed on their previously announced misfortune and profited by the predicament which had befallen them. The storage of "evacuees" property at the risk of the evacuees provided for in the "instructions" attached to each civilian exclusion order doesn't suggest much interest was wasted on "evacuees" property.

His arbitrary exclusion orders were applied even to American soldiers of Japanese ancestry who, while on furlough and in uniform, attempted to visit their families in the assembly and relocation centers. A few of these soldiers were arrested and removed from

the forbidden areas. Did this mistreatment of loyal soldiers indicate a genuine suspicion of them or mere prejudice on his part? On April 19, 1943, in obedience to instructions from the War Department, he was compelled to rescind his orders as to them and to permit them an unrestricted freedom of movement within his departmental command. (See Pub. Proc. No. 17.) He would not even make exception of those families who had their sons in service or of those who were veterans of the first World War.

Great care was exercised in the compilation of this *Final Report* that neither the written material nor the pictorial summary would reveal the presence of the armed guards patrolling the outskirts of the concentration camps and the barbed wire enclosures. The studied endeavor to portray things as they are not could not have been inspired by a desire to give the public a true picture of life in these prisons. On page 444 we are treated to a picture of a guard in a watch tower at the Tanforan Assembly Center. The footnote there informs us the military police were responsible for a protective custody of the inmates in reciting they were stationed there for "the external security of the assembly centers". We would be led to believe also that guard towers were designed for fire detection purposes for it also recites "guard towers were erected at strategic points and a watch kept for fires and other dangers". Perhaps we are to believe that the guard appearing therein was not armed—his revolver is not shown. The pictorial representations would mislead us into the belief that life in these pens

was an approximation to Heaven. To the unfortunate evacuees, however, it has a bitter likeness to Hell.

General DeWitt is an able organizer. He demonstrated this while in charge of the Western Defense Command. He is now in France. On the field of battle he may write himself high in the annals of courage and merit fame. This will be a kind of immortality. It will not wipe out the wrong he did these citizens. It has been aptly pointed out by census analysis that the evacuation "was largely of old men, women and children". (See Harrop A. Freeman, "*Genealogy, Evacuation, and Law*" in 28 *Cornell Law Quarterly* at page 443 et seq.) All this without examining into their loyalty and without accusing them of crime. Would he persuade us that reasonably prudent persons expected these people to turn berserk and run amuck when each of these persons then had at least one family representative in our armed forces who was ready and willing to shed his blood in defense of this country? Would he have us believe that it was necessary to punish a population for what he would term a suspected possibility of the disloyalty of a few in their midst? Would he have us believe his program was the result of sound discretion and judgment when he did not single out one disloyal person, did not accuse one person of crime and when he failed to

[24] All the youths fit and qualified for military service have left these prisons for duty in the Army. Those now detained in these concentration camps are the aged, the infirm, timid women, infants and youths unqualified for military service and, therefore, according to the notions of the General and the W.R.A., fit only for imprisonment. There are many Gold Star mothers in each of the camps.

make any provision for their examination between December 7, 1941, and the time each of these exclusion orders issued, the last of which became effective in late August, 1942? His action seems to have been more the product of vindictiveness than of a genuine distrust of them. He has branded these, our people. He has held them up to public scorn. They hang their heads in shame although they are guiltless of wrong. He carries his head high. He is proud. He is guilty of the gravest wrong ever done to any of our citizens.[24a]

Christianity, Buddhism, Shintoism, and emperor-worship.

The General attributes a part of his distrust of these deportees to the religions they profess. He believes them to be Buddhists and Shintoists and, in consequence, emperor-worshippers. He appears, therefore, to be misinformed about these religions and their adherents. Had he been familiar with the facts he would have known that the majority of the deportees are Christians and united to us by a common religious bond.[25] Did he really believe these to be "potential" spies and saboteurs bent upon our destruction? Does he wish us to believe they are not assimi-

[24a]On December 4, 1942, when the last of the deportees had been lodged in a War Relocation Center, General DeWitt pinned a Distinguished Service Medal upon his chief-of-staff, Col. Bendetsen, for having had a hand in this banishment and imprisonment program that is for aiding in the deprivation of the constitutional rights of the deported citizens. No similar or comparable distinction has been shown the Attorney General for originally opposing the program, that is, for endeavoring to protect the constitutional rights of these citizens. Honor apparently does not always fall to the deserving.

[25]See H. Res. 113, p. 11,771; Strong E. K., "The Second Generation Japanese Problem", p. 254; H.R. 2124, p. 148.

lated into our national life because they profess Christianity which transcends racial barriers? A number of the aliens and citizens are followers of Prince Siddhartha who became the gentle Gautama and one of the line of Buddhas. Did he believe that Buddhism teaches its adherents to engage in espionage, sabotage and war? No one with the slightest respect for truth would state that it teaches anything but non-violence and resignation to fate and never the harboring of hatred or the commission of crime. The monotheistic faith of the Nichiren sect is scarcely distinguishable from Christianity. In none of its sects does Buddhism worship any emperor.

He suspects them also of being "potential" spies and saboteurs because Shintoists may be found within their ranks who worship the Japanese emperor as a God. If there be any among these people who profess faith in Shinto we must understand what this religion is before accusing them. It is sometimes called the national religion of Japan and is often confused with what may be termed emperor-worship by the advocates of untruth.[*] It has evolved from a primitive religion of great antiquity, the origin of which is lost in the mist of time but, like other great religions of earth, it has been subject to change and evolution. It has been modified by Buddhism, Taoism and other religions and philosophies. The name of the primitive religion of Japan is unknown. Buddhism

[*] In 1937 there were 111,739 Shinto shrines, 71,336 Buddhist temples and 1708 Christian churches in Japan, figures which throw doubt upon the truth of the oft repeated statement that Shinto is the national religion of Japan.

reached Japan in the sixth century, and the primitive religion then became known as Shinto, a name of Chinese origin. In the ninth century the two creeds were welded into a system of doctrine under the name of Ryobu Shinto (dual Shinto). The primitive religion has never been fully revived. See Vol. 15, Encyc. Brit., 11th Ed., p. 222, article on Japan, Religion. None of the great religions of the day have fully preserved their pristine glory. The church philosophers have modified them and changing environments have produced subtle changes in them. If it be true that Shinto has evolved from ancestor-worship it does not differ in this from the other great religions which smack of earth, but this is no reason why its adherents should be ashamed of its ancient practice.

On pages 11-12 of his "*Final Report*" the General suggests that these people are dangerous because Shintoists are ancestor-worshippers who worship the Japanese emperor. Like many others he appears to have succumbed to propaganda which was devised to implant just such thoughts in the public mind. It took seed in his, blossomed and produced strange fruit. The early inhabitants of the Japanese archipelago, Ainu, Asiatic and island invader of mixed blood strains, venerated their ancestors. So have and do most of the peoples of the earth. We see an exaggerated form of it in plebeians who, lacking a genealogical tree revealing patrician origin, for a modest price acquire portraits of distinguished personages whom they adopt as ancestors for conventional reasons. Frequently the desire of those who fear anony-

mity is satisfied by a projection into the past and fiction to acquire presentable pseudo-ancestors *nunc pro tunc* to render the possessors respectable and to lend them social prestige and make them socially acceptable. For a reasonable price, too, one may obtain the services of a scribbler to create an impressive line of ancestors, the printed word importing at least a *prima facie* respectability in one's line of ascent into the past. A substitute form of this longing is satisfied in others who achieve the appearance of importance when their names appear in one of the various "Who's Who" publications which seldom are read by any except those whose names are buried therein and which are about as bulky and interesting as the ordinary city telephone directory without, however, possessing the latter's accuracy. A variant of thise veneration is exemplied by Herr Schicklegruber who, born an Austrian with Napoleonic aspirations, desired and became, by his own orders, Herr Hitler, first citizen of Germany but, by his own will, a barbarian and an atavistic type of human. He demonstrated to the world his reverence for his spiritual ancestor when France fell by appearing in Paris to bow in reverence to the gloomy sarcophagus containing the mortal remnants of the Corsican oppressor. There are many who stalk and strut on earth in the belief they have a spiritual affinity to great conquerors of the past. There is no legal prohibition against the acquisition of a series of eminent ghosts, forbears or bones by adoption if one feels ashamed of his own provable ancestors. Neither our good Father Adam nor our

good Mother Eve will protest, knowing full well the nature of their line.

The sun-goddess Amaterasu whose shrine is at Ise had a grandson, Ninigi, whose great grandson was Kamu-Yamato-Iware-Biku (722-585 B.C.), the chieftan of a small family or clan who later was recognized as the first ruler of Yamato.[27] Fourteen centuries after his death when the land of Yamato had been extended to include a larger portion of the island of Honshu this ruler was given the name of Jimmu Tenno, a name signifying "ruler of divine-valour" and not, as propagandists would have us believe, "son of Heaven". The name Jimmu is posthumous and was invented during the reign of Kwammu (782-806 A.D.) and is a Chinese translation of the quality assigned to a ruler, and means "divine-valour", the Chinese word "Tenno" signifying "ruler".[28] The Chinese ideographs for the name demonstrate that the ruler reigns in an area on earth, that is, under the sign for Heaven, to distinguish it from a spiritual plane. It is evident, therefore, that Jimmu himself made no pretensions to divine descent or divine power. He might have been regarded a king during his time although not an emperor because his jurisdiction extended over only a portion of Honshu. Were he a deity he would not have rested content on learning that one of his descendants, by becoming an em

[27] See the Kojiki, compiled in 712 A.D., and the Nihongi, compiled in 720 A.D.

[28] See Encyclo. Brit., 11th Ed., Vol. 15, pp. 252-254, article by Capt. Frank Brinkley, R.N. on Japan, Domestic History

peror, had risen to a higher station than he had attained as a mere king. Divinity does not expand with the efflux of time.

With the ascendancy of the Shogunate to power the Mikado was forced into retirement at Kyoto and was relegated to a position of political unimportance. With its decline he was recalled to Yedo (now Tokyo) to assume the little political power the new order was willing to surrender. The fiction of divine descent, derived from myth, was revived by the politicians for political reasons but it was neither conceived nor accepted as an article of religious faith.[29] It could mislead only the illiterate, the ignorant and the dupes. In his political capacity the Mikado is accepted by his subjects as the Emperor of Japan and in his priestly capacity as the Chief Priest of Shinto. In neither does it appear that he claims divine descent or power. In neither is he worshipped as a divinity by his subjects, but, in his priestly capacity he is revered as is the Anglican Archbishop, the Roman Pope, the Moslem Caliph and other primates of religious institutions. Respect or reverence for leaders of religions is not to be confused with the adoration and worship reserved for deities. The Shintoists believe in an after-life and in a divine spirit, termed Zain, a tetragrammaton which, interpreted, signifies Supreme

[29] Arai Hakuseki and Ichikawa, the leading Japanese philosophers of the 17th century, dispelled the myth of the divine origin of the Imperial family; the latter, anticipating Darwin by more than a century, argued the ancestors of all men were animals. Brinkley, Capt. Frank, "Japan", Vol. V, pp 254. Durant, Will, "The Story of Civilization", p. 865.

Being or God. The Japanese emperor as the Chief Priest of Shinto is but a mere representative of the divine on earth in the same manner and to the same extent as other earthly primates. He is not considered an earthly divinity by osmotic process or by divine descent or election.

A few superficial authors who appreciate stories more than truth classify Shinto as ancestor-worship whereas the fact is it is nothing of the kind. In its rites and rituals it honors ancestors and its precepts teach respect and reverence for one's forbears, consequently, it may be characterized as teaching ancestor-respect or ancestor-reverence.[30] In this it does not differ from other earthly religions. In the Mosaic Code both Judaism and Christianity teach, "Honor thy Father and thy Mother", but the pious Jew and the pious Christian would not be inclined to recognize this as ancestor-worship or to identify it with ancestor-worship. Reverence for rulers and primates is characteristic of nearly all peoles. According to Japanese legends, all Japanese are god or dodess descended. It scarce could be expected that the descendants of one god would worship the descendants of another. No sensible Japanese national as a follower of Shinto views the Japanese sovereign either as a divinity or as divinely descended. The appellees cannot point to one American citizen of Japanese lineage as a Shintoist or as a believer in an emperor-cult. It is doubtful if they can point to any

[30] Moto-ori Norinaga. Kojikiden

followers of Shinto in this country except a few from among the ranks of those aliens who long have resided here. They cannot point out one feature of Shinto incompatible with loyalty to America. It has been a practice to hang pictures of Washington and Lincoln in Shinto temples in this country that devotees might pay respect to these emancipators. (H.Res. 113, p. 11,808.) The Christian who shuns as abhorrent the thought of being descended from a god nevertheless prides himself on being created in the image of God, not recognizing both views are presumptuous to say the least. No, what is miscalled "ancestor-worship" in Shinto is nothing but a quasi-traditional cult of ancestors, that is, of ancestors revered but not worshipped. It is connected with the Pythagorean idea of "repetition", the Buddhist idea of eternal "recurrence" and probably the whole theory was derived from the "reincarnation" belief of the cult of Krishna, a religion of Vedic origin. The projection of the personal ego into the future and hence eternity on a physical plane through the medium of children is a form of the same thing. Those who believe their own immortality is perpetuated in their own offspring reveal their doubts about the survival of their own souls, however. If they are successful in this world, however, many are quick to regard themselves as entitled to the credit of greatness to the exclusion of their ancestors and descendants.

State-Shinto.

Shintoism must not be confused with "State-Shinto," political-Shinto or Shinto-nationalism which is a modern nationalistic political movement in Japan sponsored by militarists bent upon establishing the supremacy of state-power with its leaders, of course, holding the reins of government. It is an apotheosis of state-power, the emperor, as a figure-head to whom political power is not, in fact, entrusted, being the symbol of the state. See H.Res. 113, pp. 11,808-11,811, testimony of Ronald L. Latimer, an American Buddhist priest, distinguishing State-Shinto from Buddhism and Shinto. It advocates the divine right to rule, a theory not altogether discarded by European emperors, kings and pretenders to thrones. Each of these singular persons refers to himself in the plural as "we" and asserts he reigns or is entitled to reign "by the Grace of God" but claims his title "by divine right." The common practice of those who are born or buy their admission into the ranks of the nobility prefix to their names the description "Lord," a practice suggesting who sports it is deemed to have derived it from a heavenly and not an earthly source. The appellees have no evidence of State-Shinto ever having been imported into the United States. We have a variant of it that is a native product. It is exemplified by a military commander who, presuming to act in the name of the state, oppresses citizens.

The apotheosis of a state, symbolized by a person, is not an uncommon historical event. Military heroes, proud of successes which they measured by the terror

they inspired in subjugated peoples, have elevated themselves from mere thrones they inherited or seized to positions of gods and commanded themselves to be worshipped. Alexander disavowed Philip as his father, claimed descent from Herakles and thereafter asserted he was a son of Jupiter Ammon. Julius Caesar claimed descent from Venus. The line of rulers following him established an emperor-cult. Caligula enrolled himself as a god. The deification of scholars, mystics and rulers has been common. Buddha, Kung Futze, Plato, Amenhotep IV, Hwang-ti, Al Ghazali, Apollonius of Tyana and Louis XIV, "*le roi soleil*," have been deified with official cults. The current "Songs of Lenin," the poems dedicated to him and the great treks to his granite mausoleum in the Red Square indicate the revolutionary hero is en route to deification. The "Heil Hitler" salutation is evidence the Nazi chieftan, while his star was ascendant, was scheduled for the same eminence. It is equivalent to "Ave Caesar" which had the significance of "Ave Dei." There are prominent persons at large who, not being averse to the honor, covet a comparable distinction. For some reason each generation seems to have divinities running about on earth. Fairly recent claimants to the dubious honor are the extraordinary Moses Guibbory, alias Jehovah the First and Last, etc., residence address, Cave of the Sanhedrin, Jerusalem, temporary whereabouts, New York City. (See "*The Bible in the Hands of Its Creators*," N.Y., 1943), and Father Divine, sometimes of New York City and, more recently, of Hyde Park. Mayhap these are signs or symbols or, perhaps, just symptoms.

Bushido.

The General also suspects these people because a few of them exhibit an interest in Bushido. (See *Final Report*, p. 11.). He does not seem to be well informed as to what this is. Bushido is simply an ethical code attempted to be engrafted on the modern Japanese warrior caste whether the warrior is *samurai* or *heimin* descended. It is a substitute for the samurai code of medieval Japan and a counterpart of the chivalric code characteristic of European nations in their feudal age when knighthood was in flower and before Cervantes put it to seed by publishing "Don Quixote" in 1605. It is derived from rules of conduct prescribed by feudal chieftans for their retainers. For example, see *Code of Kato Kiyomasa*. The General's report (p. 11) demonstrates that the bushido which occasioned him so much alarm consisted of teaching boys kendo, judo and sumo, i.e., fencing, jiujutsu and wrestling, excellent forms of physical culture which our Army prescribes for the training of youths in service. He has not informed us how these tend to convert a harmless youth into a spy or saboteur.

Assimilation.

In the *Hirabayashi* opinion this Court concluded that there was "support for the view that social, economic and political conditions" prevailing since the Japanese came to this country "have intensified their solidarity" and, in a measure, have "prevented their assimilation as an integral part of the white population." The aliens are ineligible to citizenship. *Ozawa*

v. U. S., 260 U.S. 178. This has prevented them from assimilation into our political activities but not from our social and economic life. The citizens are native born and participate in our political activities. Very few of the foreign born long would have remained aliens had we made them eligible to citizenship. None have been so eager as these for citizenship. The ships the Japanese government sent here to evacuate aliens in November, 1941, when war was imminent, returned to Japan with few passengers. It appears that those who took passage were not bona fide residents but aliens who had come here on business and pleasure trips. H. Res. 113, p. 11,452, 11,477. Our alien residents demonstrated their loyalty to the United States by remaining here with their citizen children in the country to which they are bound.[31] This was an expression of loyalty that all the absurd suspicion of them cannot erase. Miscegenation statutes such as Sections 60 and 69 of the California Civil Code prohibit the intermarriage of white persons with Mongolians, Malays and Negroes but marriages contracted between them in states where no such prohibitions exist are valid in the states where the miscegenation statutes are in effect. The prohibitions, therefore, are ineffective and the number of mixed marriages is on the increase. The birth of mulattoes and mongoloids is not to be attributed to a desire to preserve the

[31] Despite the treatment they have received, if the government today were to offer to transport the aliens and citizens who desired to leave, none of those imprisoned in the relocation centers would accept the offer and there would not be in excess of a dozen of the Tule Lake alien segregants who would accept the offer.

"purity of race" so dear to those who proposed and those who would defend these silly statutes. The constitutionality of these statutes in so far as applied to citizens is to be doubted. State legislation designed to prevent aliens ineligible to citizenship from owning agricultural land, such as the Alien Property Act of 1919, California General Laws, Act 261, which were the result of the Oriental-baiting Exclusion League's activity, in nowise affects the right of citizens born of Japanese parents from possessing title to land; consequently, the purpose of these statutes is largely defeated. Such legislation has no bearing on the assimilation of their citizen issue into our economic life.

This Court also assumed that there was relatively little social intercourse between these people and the white population and that the restriction of privileges and opportunities afforded persons of Japanese extraction "have been sources of irritation and may well have tended to increase their isolation and in many instances their attachments to Japan and its institutions." The Court erred in its assumption. These citizens have been reared in our communities, have attended the same public schools, have frequented the same places of amusement and have enjoyed the same entertainments. They have engaged in the same employments, businesses and professions. The aliens have enjoyed substantially the same privileges. The sources of irritation to which the Court refers were of an historical nature existing until the turn of the century; the isolation ceased at that time. The conclu-

sion of a possible attachment to Japan and its institutions is not borne out by facts. The aliens came here in the first instance to avoid the social, economic and political conditions they experienced in Japan. Our European ancestors settled here for like reasons. Neither they nor we should be ashamed of the poverty or misfortunes of our ancestors.

Even the incarceration of these people in W.R.A. concentration camps has not rendered them hostile to this nation. The implied classification of disloyal attached to the few citizens deposited in the Tule Lake Segregation Center is to be viewed with caution and doubt inasmuch as it is an arbitrary brand. The incarceration and its attendant impoverishment is not conducive to patriotism but it does not render these people disloyal. The blood the sons of these have shed in our defense on the battlefields of the Pacific, Sicily and Italy dispute the conclusion of attachment to Japan more eloquently than mere words.

Propaganda.

This Court's conclusion in the *Hirabayashi* case that the "association of influential Japanese residents with Japanese consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country" does not seem to be warranted by the very authority cited. H.R. 1911, p. 17. That the alien males whose average age is now some 60 years (H.R. 2124, p. 95) and who had resided in this country for a period in excess of 20 years, ibid. 92) would have been guilty of circulat-

ing such propaganda taxes credulity. There is no doubt that Japanese consulates and associations spread propaganda (*Final Report*, p. 10), of a more or less innocuous type during the pre-war period but it was not directed against the United States. As propaganda it was ineffective—the loyalty of the American-born youth in this war demonstrates that quite conclusively. This country has been flooded for a good many years with Communist, Nazi and Fascist propaganda from consulates, foreign organizations and domestic organizations but it can be said that although the American public has been inoculated the vaccination has not taken. Propaganda addressed to youths of Japanese ancestry has not influenced them against this country. We are unable to discover any reliable evidence that propaganda from Japanese sources was designed or had the effect to turn these people against this nation.

The language schools.

The sending of children to Japanese language schools after regular school hours is just as harmless as sending children to supplementary schools to learn any of the European tongues. Some suspicion has been aroused over the existence of these schools. The ignorant always slander and would suppress what they do not comprehend. This Court stated in the *Hirabayashi* opinion that "some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan." Suspicion on the part of persons wholly unfamiliar with the purposes of these schools affords no basis

to characterize them as subversive. There is no evidence whatever that any of these schools spread Japanese propaganda or in anywise endeavored to indoctrinate the pupils with noxious ideas. These schools originally were set up to teach Christianity and to Americanize children. See H. Res. 113, p. 11,772, and 28 *Cornell Law Quarterly*, pp. 448-449, and authorities there cited. They are to be commended on work well done. The average attendance of a pupil in these schools was found to be three years. The children exhibited about the same amount of interest or lack of interest in a foreign language as the average American school child. Few acquire more than a rudimentary knowledge of the Japanese language. Although a thorough knowledge of it might have occupational advantages few attain proficiency. See E. K. Strong, "*The Second Generation Japanese Problem*," pp. 6, 201. To gain an adequate reading and writing knowledge of Kanji (Chinese ideographs) used in the written language without the aid of accompanying columnar native syllabic characters requires years of study. These are barriers rendering it difficult of mastery. The little interest these children have exhibited in Japanese and their want of proficiency in it are understandable. The O.W.I. experienced considerable difficulty in finding even a few citizens and aliens qualified to act as translators of Japanese. The Army and Navy Intelligence services encountered similar difficulty and to obtain competent interpreters and translators opened up Japanese language schools at Savage, Minnesota, and Boulder, Colorado. These suspect language schools were unable to sustain the

interest of children in Japanese but did succeed in teaching Christianity and in Americanizing children. White children have been admitted freely to these schools. We are unable to discover any statements emanating from them in any manner characterizing these schools as being dangerous to our government. No reputable authority charges these schools with having been of a subversive nature. Our administration views them in a favorable light. It sponsors and fosters these schools in the W.R.A. concentration camps.

Dual citizenship.

The dual citizenship charge frequently brought against a few of these citizens too often is conceived as indicating dual allegiance. The conception is false. The United States disavows the claims of all foreign governments to the allegiance of our citizens. 18 USCA, Section 800. There is neither a legal nor a moral duty imposed upon a native-born American to divest himself of the citizenship which a foreign country may bestow upon him by virtue of its *jus sanguinis*. Why should he disavow that which he refuses to recognize? Should he spend time and money simply to notify a foreign government that he does not recognize its *jus sanguinis* and then take trouble to extricate himself from its futile claims by a complicated legal procedure? An American consul in Japan in peace time owes the American-born citizen there the full protection guaranteed by the *jus soli* of the United States under international law and this nullifies any claim Japan might assert as to jurisdic-

tion over him arising out of its *jus sanguinis*. Why should we ask these people to go to the trouble of voiding a citizenship Japan confers when they do not even accept it? Refusing to recognize it or ignoring it is in itself a repudiation. We do not ask the descendants of European aliens here to renounce citizenship arising from the *jus sanguinis* of European governments and we do not accuse them of disloyalty arising out of the fact of dual citizenship or failure to renounce it. Dual citizenship is not dual allegiance and does not create disloyalty to this nation. It is significant that Japanese descended persons have done more to shake off the dual citizenship they never solicited than have European descended citizens. Since 1924 the sole method by which an American-born Japanese can obtain rights to Japanese citizenship is by being registered within 14 days after birth with a Japanese consular official. See texts of Japanese Nationality Laws and Imperial Ordinances in Kiyo Sue Inui's "*The Unsolved Problem of the Pacific*," pp. 300-320; H.R. 2124, p. 85, note 80; 28 *Cornell Law Quarterly*, pp. 447-448. Such registration, however, could not constitute acceptance of Japanese citizenship by an infant who is not *sui juris* and is powerless to prevent the idle act. The appellant was never so registered. If we are to suspect citizens of disloyalty simply because the country of their ancestors looks upon them as entitled to the benefits of citizenship under its law we must necessarily suspect all German and Italian descended citizens of disloyalty. We must also entertain serious doubts about the loyalty of all of our citizens of foreign stock, which means of all our

citizens, for we are all descended from foreign stocks. Even the Indians must be suspected for they appear to be descendants of Mongolians. All that the silly suspicion of these people arising out of the charge of dual citizenship proves is that there is a lot of nonsense in prejudiced skulls.

The Kibei.

The General belatedly informs us of his belief that the Kibei might have been dangerous to our security. In the *Hirabayashi* case this Court speculated that this factor might have entered into his consideration concerning evacuation. The spectre was created by employing the word Kibei which has a foreign and mysterious sound to designate youths who have received a portion of their school in Japan. Was he frightened by the word? Thousands of our citizens have received a part of their education in Italy and Germany but the General didn't think of accusing them of attachment to those countries and of constituting a potential threat of danger to us. We had no word to classify them and frighten him. The F.B.I. had a complete list of the Kibei and if it suspected any of them of being hostile to us it would have arrested the suspects and examined them promptly on the question of their loyalty in the same manner as it did Japanese nationals. If the General had any cause to doubt the loyalty of any of these, he could have issued individual exclusion orders against those found to be a menace after examinations observing the elements of due process of law. The General, however, desired no such examinations. It is to be

assumed he did not because he feared their loyalty to us would be proved and his banishment program thwarted. If this was not the cause it must be concluded he was fed upon jingoist literature during his youth and had come to the belief that Oriental descended persons are all fierce, treacherous and depraved. Perhaps he read "yellow sheets" too often and too long.

If education abroad is to form the basis for a belief that it inculcates allegiance to the country where a person receives a part of his education and disloyalty to the country of which he is a citizen by birth and by choice it is evidence that all of our citizens who attended the universities of Cambridge, Oxford, Dublin, Paris, Strassbourg, Moscow, Salamanca and Brussels along with those who attended Heidelberg, Rome and Milan should be suspected, denaturalized or expatriated and finally deported. We would be rid of a large number of educated persons, an objective which might satisfy the ignorant.

CONCLUSION.

Between December 7, 1941, and the time each civilian exclusion order was issued General DeWitt had ample opportunity to arrange for the Army or civil authorities to examine into the loyalty of each person he intended to evacuate. He desired no such examinations. He would brook no opposition to his plan. He was bent upon a mass banishment and imprisonment. His then unexpressed accusation that they or some

among them might have had a predisposition to the commission of acts of espionage or sabotage and that their removal was a public security measure is spun of sheer mist. A military commander who cannot or will not endeavor to distinguish between a loyal citizen and a hostile alien lacks perception as well as judgment. It is a poor gardener who doesn't perceive the difference between a native plant and an alien weed. General DeWitt uprooted the whole garden. His neglect or refusal to make provision for their examination and the segregation of the disloyal, if any were found, within a reasonable time when the civil authorities were not only willing and competent to conduct such examinations and already had done so in the case of suspected alien enemies, was willful. He cannot now be heard to argue that his refusal to permit this was an exercise of sound discretion and mature judgment. It appears to be a constitutional infirmity of a few professional military minds to evaluate citizens as *res* and targets but seldom as humans.

It is not unlikely that General DeWitt entertained the opinion that the courts would sustain his action despite the fact that he long failed to divulge his reasons for this imprisonment program. This must have been based upon a notion that the courts in time of war conceive of themselves primarily as warriors and only secondarily as guardians of the civil liberties of citizens. Apparently he did not realize that our courts function as the sole barrier between democracy and tyranny. They constitute the bridge which links us to a republican tomorrow or to a totalitarian tomorrow.

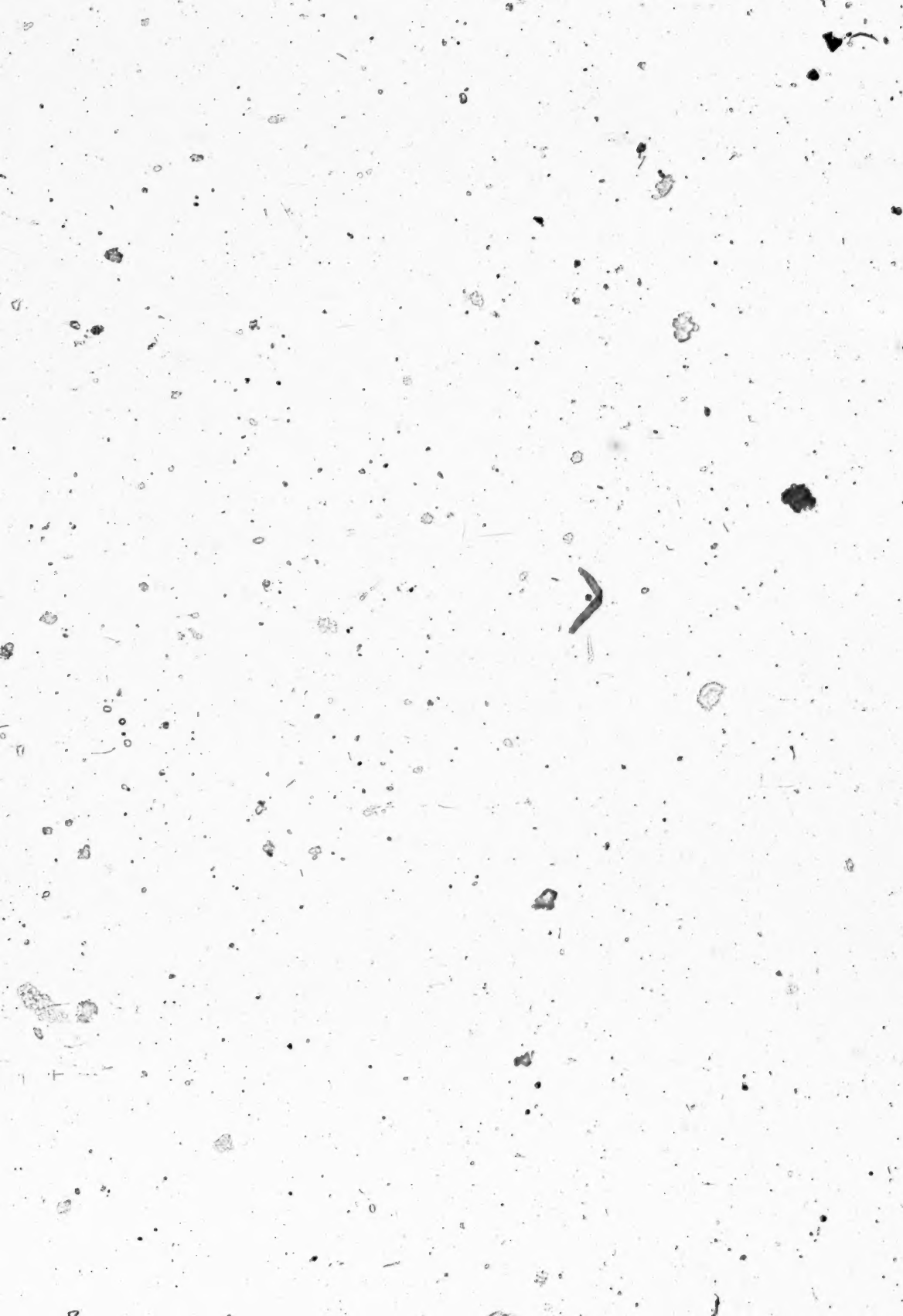
Who is this DeWitt to say who is and who is not an American and who shall and who shall not enjoy the rights of citizenship? Did he think he was a "leader" called to summon these, our people, to a Munich or Berchtesgaden? Did he think he was our chamberlin and yet forget he was the sworn servant of these citizens? While he was toying with the notion of a military dictatorship over them and trifling with its dangerous paraphernalia did he think he was acting the part of a saviour? A messianic delusion is a dangerous thing in a military mind. Napoleon had it and brought Europe to ruin. Mussolini had it and brought Italy to ruin. Hitler has it and has brought Germany to ruin.

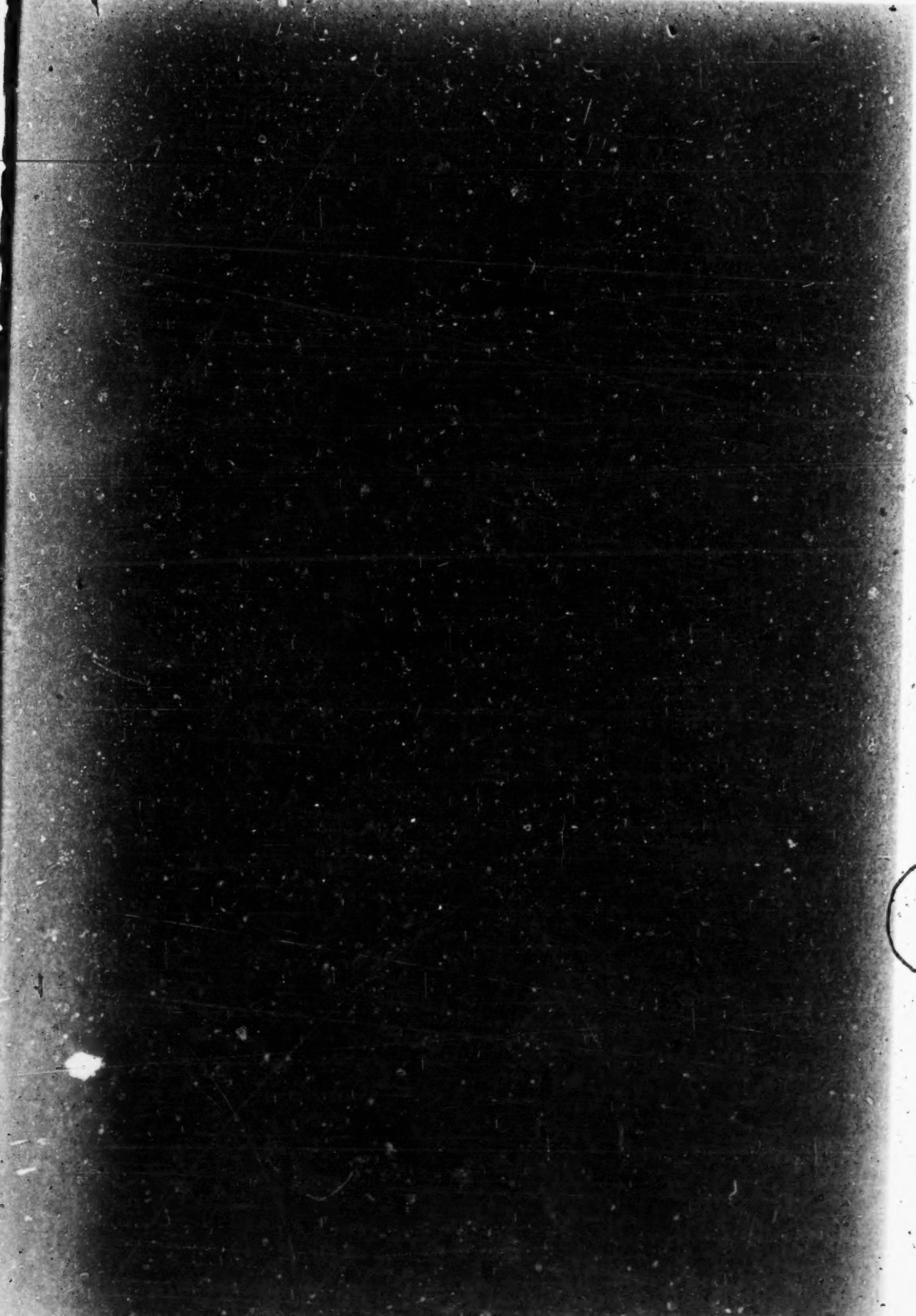
General DeWitt let Terror out to plague these citizens but closed the lid on the Pandora box and left Hope to smother. It is your duty to raise the lid and revive Hope for these, our people, who have suffered at the hands of one of our servants. Do this speedily as the law commands you. History will not forget your opinion herein.

Dated, San Francisco, California,
September 15, 1944.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Appellant.

(Appendix Follows.)





Appendix

STATUTE, EXECUTIVE ORDER AND MILITARY ORDERS, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED.

Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, H. R. 6758, approved March 21, 1942 (see Title 18, U. S. Code, sec. 97a), the application and validity of which is involved herein, reads as follows:

> "Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Executive Order No. 9066, the construction of which is involved herein, was promulgated by the President under date of February 19, 1942. It appears in the *Federal Register* of February 25, 1942, in Vol. 7, No. 38, page 1407. It reads as follows:

> "Whereas the successful prosecution of the war requires every possible protection against espion-

age and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and

authority of the Attorney General under the said Proclamations in respect of such prohibited and restrictive areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder."

Headquarters
Western Defense Command
and Fourth Army
Presidio of San Francisco, California

May 3, 1942

CIVILIAN EXCLUSION ORDER No. 34

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P.W.T., of Saturday, May 9, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 4 described as follows:

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said Highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly and following the shoreline of San Francisco Bay to the point of beginning.

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or during the same hours on Tuesday, May 5, 1942, to the Civil Control Station located at:

920 - "C" Street,
Hayward, California.

3. Any person subject to this order who fails to comply with any of its provisions or published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P.W.T., of Saturday, May 9, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones", and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DEWITT,
Lieutenant General, U. S. Army
Commanding

C. E. Order 34

Western Defense Command and Fourth Army
Wartime Civil Control Administration
Presidio of San Francisco, California

INSTRUCTIONS
to All Persons of

JAPANESE
ANCESTRY

Living in the Following Area:

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly, and following the shoreline of San Francisco Bay to the point of beginning.

Pursuant to the provisions of Civilian Exclusion Order No. 34, this Headquarters, dated May 3, 1942, all persons of Japanese ancestry, both alien and non-alien, will be evacuated from the above area by 12 o'clock noon, P.W.T., Saturday, May 9, 1942.

No Japanese person living in the above area will be permitted to change residence after 12 o'clock noon, P.W.T., Sunday, May 3, 1942, without obtaining special permission from the representative of the Commanding General, Northern California Sector, at the Civil Control Station located at:

920 - "C" Street,
Hayward, California.

Such permits will only be granted for the purpose of unifing members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.

2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles and livestock.

3. Provide temporary residence elsewhere for all Japanese in family groups.

4. Transport persons and a limited amount of clothing and equipment to their new residence.

The following instructions must be observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each indi-

vidual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 A. M. and 5:00 P. M. on Monday, May 4, 1942, or between 8:00 A. M. and 5:00 P. M. on Tuesday, May 5, 1942.

2. Evacuees must carry with them on departure for the Assembly Center, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;

(e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group.

3. No pets of any kind will be permitted.

4. No personal items and no household goods will be shipped to the Assembly Center.

5. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household

items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

6. Each family, and individual living alone, will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or between the hours of 8:00 A. M. and 5:00 P. M., Tuesday, May 5, 1942, to receive further instructions.

J. L. DeWITT,
Lieutenant General, U. S. Army
Commanding

May 3, 1942

See Civilian Exclusion Order No. 34.